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**Information And The Internet: Understanding The
Emerging Legal Framework For Contract And Copyright
Law And Problems With International Enforcement**

Trevor Cox*

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I. INTRODUCTION

The Internet provides new opportunities for the expansion of international commerce. A small business in the United States can instantaneously transmit information around the world and can transmit unlimited copies of the information with little or no cost to the person transmitting the information or the person receiving the information. However, once a business has transmitted the information to a customer, the business must be concerned with its customer transmitting the information to others without authorization. To prevent further transmissions, a business could rely on a license where a customer agrees not to make further use of the information without authorization, or could rely on the protection of the copyright laws.

Even though businesses can rely on contract and copyright protection, the current contract and copyright laws were not intended to address the unique issues involved with digital technology and do not regulate the information separate from a tangible good or the labor which created the information. Further, the copyright laws have not been amended or clarified to provide guidance on the issues created by the Internet.

A business must also be concerned with the feasibility of enforcing its license or copyright claims in another jurisdiction. Since the Internet transmits information across national borders, a business needs effective means to enforce a contract or copyright claim against a person located in another country (hereinafter "state").¹ Without effective enforcement, businesses could hesitate to fully utilize the Internet for international commerce since there is a significant risk that the information will be freely transmitted without payment to or authorization of the business.

II. HYPOTHETICAL

This Article utilizes a hypothetical to narrow the focus of the discussion and to make it practical to provide a broad discussion of the diverse contract and copyright issues faced by a business on the Internet. MUSICO is a small start-up business located in the United States which specializes in selling music scores over the Internet. BROWSER is one of MUSICO's customers on the Internet. BROWSER is located outside of the United States. Once BROWSER has accessed MUSICO's Internet site, MUSICO and BROWSER conclude a contract and perform under the contract entirely over the Internet. By placing MUSICO in the United States, this Article focuses on the issues from the perspective of a business located in the United States. The discussion of contract law will focus on the current developments in the United States under the assumption that MUSICO will use a choice of

1. To distinguish between states (countries) in the international community and states in the United States of America, "States" in the United States will be capitalized.

law clause which makes the laws of the United States applicable. Further, the discussion of international enforcement will be from the perspective of a United States business.

This Article considers issues related to the emerging contract and copyright law and also considers issues related to international enforcement. Part III discusses the conceptual difficulties, which emerge when applying the existing body of contract laws to digital technology. Further, Part III introduces a new body of contract law being drafted in the United States, entitled Uniform Commercial Code Article 2B ("UCC Article 2B") which specifically applies to the licensing of information. An international practitioner should be aware that two bodies of contract law could apply to the same transaction.² The United Nations Convention for the International Sale of Goods (hereinafter "CISG"),³ or the Uniform Commercial Code Article 2 ("UCC Article 2")⁴ will apply to the sale of the good; however, the proposed UCC Article 2B will apply to the information embedded in a good if the information is licensed.⁵

UCC Article 2B is not a body of contract law designed for only computer programs.⁶ UCC Article 2B can be applied to books, magazines, sheet music and other types of information even if the information is embedded in a tangible good.⁷ When drafting a contract, understanding the provisions of UCC Article 2B is essential to providing the best protection for a client's information. Finally, Part III discusses the advantages and limitations to UCC Article 2B in transnational contracts. With the expanding commercial use of the Internet by businesses and consumers, an international practitioner must be aware of the advantages and limitations to using UCC Article 2 or UCC Article 2B for the protection of a client's information.

Part IV introduces certain international copyright treaties, introduces the proposed amendments to the United States Copyright Act and introduces the proposed areas of harmonization in the European Union.⁸ Within the international realm, the

2. See generally THE AMERICAN LAW INSTITUTE AND THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE ARTICLE 2B-LICENSES (Discussion Draft 1997) [hereinafter NATIONAL CONFERENCE 1997].

3. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980 [hereinafter CISG].

4. U.C.C. art. 2 (1987).

5. NATIONAL CONFERENCE 1997, *supra* note 2, Introduction.

6. NATIONAL CONFERENCE 1997, *supra* note 2, Introduction. "Article 2B deals with transactions in information; it focuses on transactions relating to the 'copyright industries.'" *Id.* It thus deals with transactions and subject matter that largely have never been directly covered by the U.C.C. *Id.* Of the transactions covered, only software contracts have been considered within the U.C.C. Even for computer software, coverage under the U.C.C. today is limited. *Id.* But "Article 2B is not just a software contract statute." *Id.* (Emphasis added).

7. See National Conference 1997, *supra* note 2, § 2B-102(22) (defining the term "information"); see also § 2B-103 (relating the scope of UCC Article 2B).

8. Commission of the European Communities, *Communication from the Commission: Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society* (visited Mar. 2, 1998) <<http://www.ispo.ccc.be/infosoc/legreg/docs/com96586.html>> [hereinafter *Follow-Up to Green Paper*].

new WIPO Copyright Treaty⁹ (hereinafter "WIPO Treaty") introduces: an expanded right to communicate to the public,¹⁰ an expanded right of distribution,¹¹ new protection for technological measures,¹² and new protection of management system information.¹³

Part V discusses international enforcement of claims for contract breach or copyright infringement. To enforce a copyright or contract claim against a foreigner, a business must decide where to bring suit. MUSICO must decide whether it is better to sue in BROWSER's state, sue in MUSICO's state, or use international arbitration.

This Article uses the term "information" as it is defined in UCC Article 2B.¹⁴ "Information" means data, text, images, sounds, and works of authorship, along with any related informational property rights in such information."¹⁵ Using the term information is necessary to distinguish intangible property from tangible property.¹⁶ While information can be embedded in a tangible good, information can also exist independent from the tangible good. The Internet shows how information is independent from the good. However, the definition of information does not include all forms of intellectual property.¹⁷ Patents and Trademarks are excluded from the definition of information in UCC Article 2B.¹⁸

III. INFORMATION, INTERNET AND CONTRACT LAW

This part is divided into two sections. The first section discusses the conceptual difficulties when applying the existing contract laws to a license for information. The second section discusses the scope of UCC Article 2B and discusses the advantages and limitations of UCC Article 2B in transnational contracts.

9. WIPO Copyright Treaty, Dec. 20, 1996 (visited Mar. 2, 1997) <<http://www.wipo.org/eng/diplconf/distrib/94dc.html>> [hereinafter WIPO Treaty].

10. *Id.* art. 8.

11. *Id.* art. 6.

12. *Id.* art. 11.

13. *Id.* art. 12.

14. THE AMERICAN LAW INSTITUTE AND THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE ARTICLE 2B-LICENSES (Discussion Draft 1998) [hereinafter NATIONAL CONFERENCE 1998]; *Id.* § 2B-102(23).

15. *Id.*

16. *Id.* Introduction. "Information transactions and, especially, transactions involving licensing of digital information, differ substantively from transactions involving the sale or lease of goods. The differences are manifested in both the conditional nature of the transaction and that the value obtained or conveyed lies not in the tangible property, but in the information and rights that are severable from the tangibles. Indeed, it will continue to be increasingly the case that no tangible items are needed to convey information on-line or in electronic transactions." *Id.*

17. *Id.* § 2B-103(c)(1).

18. *Id.*

A. *Conceptual Problems With The Existing Bodies Of Contract Law*

The modern practice in the software industry for transferring information is to use a license.¹⁹ The essential characteristic of a license is the conditional nature of the rights or privileges transferred between the parties.²⁰ A "pure license" is not a contract in and of itself; rather, it is simply granting the privilege to use technology.²¹ Licenses have been described by courts as "a mere waiver of the right to sue," or "nothing more than a promise by the licensor not to sue the licensee."²² A separate body of contract law does not exist for licensing information.²³ Thus, licenses must be governed by another body of contract law.²⁴

In the United States, three bodies of law could apply to a license for information: UCC Article 2 which is applicable to the sale of goods,²⁵ UCC Article 2A which is applicable to the lease of goods,²⁶ and the common law principles which are applicable to service contracts.²⁷ However, four examples will illustrate the conceptual problems with applying the existing bodies of contract law to the licensing of information. First, the current law will apply to a contract and that a contract must be for either goods or services. When a contract is for both goods and services, the traditional test to decide the applicable body of contract law is the predominate purpose test.²⁸ Under this test, the court determines whether the

19. THE AMERICAN LAW INSTITUTE AND THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *UNIFORM COMMERCIAL CODE ARTICLE 2B-LICENSES* (Discussion Draft 1996) [hereinafter *NATIONAL CONFERENCE 1996*]. "The software and online industries were the first to introduce licensing terminology into a mass market, but the use of a tangible item to transfer information with a license restricting use of the information is commonplace. Software licensing is the dominant means of commerce in software in commercial contexts and in the mass market." *Id.*

20. *Id.* at 8. "'License' means a contract that authorizes, prohibits, or controls access to or use of information but expressly limits the scope of the rights or permissions granted, or that affirmatively grants less than all rights in the information, whether the information exists or is to be developed, created or compiled pursuant to the contract and whether or not the contract transfers title to a copy of the information." *Id.* See also *NATIONAL CONFERENCE 1998*, *supra* note 14, § 2B-102(27).

21. *NATIONAL CONFERENCE 1996*, *supra* note 19, at 8 n.7-8 (citing *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 181 (1938); *Spindelfabrik Suessen-Schurr v. Schubert & Salzer*, 829 F.2d 1075, 1081 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988); *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 1988)).

22. *Id.* at 8.

23. *Id.*

24. See *NATIONAL CONFERENCE 1997*, *supra* note 2, Introduction.

25. U.C.C. art. 2.

26. U.C.C. art. 2A.

27. *NATIONAL CONFERENCE 1997*, *supra* note 2, Part 1, Law Reform and the U.C.C.

28. *NATIONAL CONFERENCE 1998*, *supra* note 14, § 2B-103, Reporter's Notes 6.

This [article] reject[s] the "predominant purpose" test that many courts use in reference to the scope of current Article 2. That test requires a court to determine, after the fact, whether the predominant purpose of the transaction was for goods or for common law subject matter. While this results in a single contract law applying to the entire transaction, the basis on which this occurs is often uncertain and subject to litigation, while its effect is often to apply a body of law suited to goods to transactional aspects involving personal services to which that law is inappropriate.

predominate purpose of the transaction was to obtain goods or services.²⁹ If the court finds the predominate purpose of the contract was to obtain a good, then the court applies UCC Article 2 or Article 2A.³⁰ If the court determines the predominate purpose of the contract was to obtain services, then the court applies the common law principles for service contracts.³¹

However, with the growing importance of information as an independent commodity, the predominate purpose test is rendered meaningless, because obtaining information is the predominate purpose of the contract.³² When contracting for a computer program, the tangible disk is incidental to the contract, because the disk is only one means to transfer the program; the licensor could also transfer the program over the Internet without using a disk. Moreover, a licensee is generally not contracting or paying for the labor to create the program, because the information may already have been created and may be intended to be sold to numerous other individuals. The licensor and licensee do not need a body of contract law that regulates the conduct of the licensor when creating the information. Instead, they need a body of contract law that regulates and provides rules and remedies for the transfer and quality of information.³³ Thus, information requires a new body of contract law, which regulates the transfer and quality of the information.

Second, a license for information is outside the scope of the existing body of contract laws.³⁴ The express language of UCC Article 2 and Article 2A requires that a good exist to apply to the contract.³⁵ Goods are all things moveable at the time of contracting.³⁶ Even though information could be considered a "thing," the usage of the term within UCC Article 2 contemplates that a thing is in a tangible form.³⁷ While information can be embedded in a tangible good, information exists as an intangible property right independent from a tangible good.³⁸ If information is sold over the Internet without a tangible good, the contract falls outside of the scope of

Id.; see also Mike LiRocchi, *U.C.C. Article II & Computer Programs*, (visited Mar. 2, 1998) <<http://www.ceres.ca.gov/elaw/Art2hme2.html>> (quoting *RRX v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir. 1985)).

29. NATIONAL CONFERENCE 1998, *supra* note 14, § 2B-103, Comment 6.

30. *Id.*

31. *Id.*

32. NATIONAL CONFERENCE 1997, *supra* note 2, Part 1, Law Reform and the UCC.

33. *Id.*

34. *Id.* Part 1, Modern Economy and Law Reform; See *The 2BGuide: Background* (visited Mar. 2, 1998) <<http://www.softwareindustry.org/issues/guide/bkgd.html>>.

35. See CISG, *supra* note 3; U.C.C. § 2-105; see also U.C.C. § 2A-103 (defining lease).

36. U.C.C. § 2-105.

37. BLACK'S LAW DICTIONARY 694 (6th ed. 1990). See *The 2BGuide: Background*, *supra* note 34.

38. NATIONAL CONFERENCE 1998, *supra* note 14, Introduction, Project History.

The differences are manifested in both the conditional nature of the transaction and that the value obtained or conveyed lies not in the tangible property, but in the information and rights that are severable from the tangibles. Indeed, it will continue to be increasingly the case that no tangible items are needed to convey information on-line or in electronic transactions.

Id.

UCC Article 2 or Article 2A. Even when the information is embedded in a tangible good, the good is often times incidental to the purpose of the contract.³⁹

Also, UCC Article 2 applies only to the sale of goods.⁴⁰ Since information is not sold under a license, it falls outside of the scope of UCC Article 2.⁴¹ Thus, UCC Article 2 should not apply to the transfer of information. However, when a contract contains a license for information and a sale of a good, two separate property rights are being transferred.⁴² UCC Article 2 should apply to the sale of the good, but UCC Article 2 should not apply to the transfer of information.⁴³ Nevertheless, courts have applied UCC Article 2 to license agreements, because the current analysis under contract law does not distinguish between the information and the good.⁴⁴ Courts reason that a license for information is analogous to the sale of a good since they have limited alternatives under the existing law.⁴⁵

Further, treating information as a service is problematic, because the body of contract law relating to services does not adequately address the issues raised by a license for information. Some courts have argued that a license for information is a service contract because the means of transmission is not the object of the agreement.⁴⁶ However, a license for information is more similar to a sale of goods than to a service contract.⁴⁷ A body of contract law, which applies to information, should regulate issues related to the transfer of information and not issues related to the performance of the labor required to create the information. The focus of the license is not to ensure that the information is created or installed;⁴⁸ instead, a licensor may be required to provide certain warranties for the content of the information, merchantability, or non-infringement of the information.⁴⁹

39. NATIONAL CONFERENCE 1998, *supra* note 14, Part 1, Law Reform and the UCC.

40. U.C.C. art. 2, § 2-101.

41. NATIONAL CONFERENCE 1998, *supra* note 14, Introduction, Project History, Part 2: Basic Themes. "A license is not a lease or a sale." *Id.*

42. See NATIONAL CONFERENCE 1998, *supra* note 14, § 2B-103, Reporter's Notes 2. "Because the emphasis is on the intangibles, rather than the goods, a license can and often does coexist with a transfer that constitutes a sale of a copy of the licensed subject matter." *Id.*; *Applied Info. Management, Inc. v. Icart*, 976 F. Supp. 149 (E.D.N.Y. 1997); see also *DSC Communications v. Pulse Communications, Inc.*, 976 F. Supp. 359 (E.D. Va. 1997).

43. NATIONAL CONFERENCE 1996, *supra* note 19.

44. See NATIONAL CONFERENCE 1996, *supra* note 19, at 5 n.3 (determining that many court decisions place software and related licensing in UCC Article 2 (sales) even though software is licensed and not sold and even though the focus of the transaction from the standpoint of both parties centers not on the acquisition of tangible property, but on transfer of capability and rights intangibles). See, e.g., *Advent Systems Ltd v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991).

45. NATIONAL CONFERENCE 1996, *supra* note 19.

46. *Id.*

47. *Id.*

48. See NATIONAL CONFERENCE 1997, *supra* note 2, Introduction, Appendix A; see also Fred M. Greguras, Trudy Gologic, Robert Mesa, Rebecca Duncan, *Electronic Commerce: On-Line Contract Issues*, 452 PLI/PAT 11, 15 (1996).

49. NATIONAL CONFERENCE 1996, *supra* note 19, at 20.

In the excluded cases, personal services contracts involve different default provisions than here . . . whether the work product of the individual entails the creations or modification of information, the

Finally, in the United States, no uniform body of law exists for service contracts equivalent to UCC Article 2 or Article 2A.⁵⁰ A uniform body of law is desirable for licensing information because information can be transmitted across jurisdictional borders with relative ease.⁵¹ Inconsistent rules could prove to be burdensome when drafting a license, which is applicable in different jurisdictions.⁵² A single body of contract law would provide a more uniform approach to the licensing of information. Thus, since both conceptual and practical problems exist with applying the current bodies of contract law to the licensing of information, a new body of contract law is needed which recognizes that information is not a good or a service.

B. Uniform Commercial Code Article 2B

The American Law Institute and National Conference of Commissioners on Uniform State Laws are currently drafting a new body of contract, which is entitled UCC Article 2B.⁵³ The final version of UCC Article 2B is not complete and is not expected to be complete until sometime after the summer of 1998.⁵⁴ The latest draft was completed on February 1998. Even though UCC Article 2B has not been finalized, understanding its basic approach is essential, because UCC Article 2B reflects the current practices within the software and the technology industry.⁵⁵ Moreover, UCC Article 2B could emerge as the international approach for the transferring of information.

1. Scope of UCC Article 2B

UCC Article 2B applies to a license for information and also to all software contracts regardless of whether the software is licensed or sold.⁵⁶ For UCC Article 2B to apply to a contract for information other than software, the contract must expressly state that the information is being licensed.⁵⁷ If the contract does not expressly grant a license, then the particular copy of the information is being sold

essence of the contract deals with the personal labor of an individual or group. Especially as to employment contracts, a large body of existing law regulates the content and enforceability of the contracts in this services context. While the contracts have commercial significance, they are not commercial contracts and no good reason appears to include them within the UCC.

Id.

50. *The 2BGuide: Background*, *supra* note 34.

51. *See Follow-Up to Green Paper*, *supra* note 8, at ch. 3, § 2.

52. NATIONAL CONFERENCE 1998, *supra* note 14, Preface, Introduction, Benefits and Positions in Draft Article 2B by Party.

53. *See generally* NATIONAL CONFERENCE 1998, *supra* note 14, art. 2B

54. *See The 2BGuide: Background*, *supra* note 34, at 2.

55. NATIONAL CONFERENCE 1998, *supra* note 14, Introduction.

56. *See* NATIONAL CONFERENCE 1998, *supra* note 19 and accompanying text.

57. *Id.*

or leased.⁵⁸ The sale or lease of information other than software is still governed by UCC Article 2 or Article 2A, because the drafters of UCC Article 2B decided to leave untouched the traditional practices in certain information industries, including the sale of newspapers and books. In these industries, the seller has no interest in controlling the use of the information beyond the exclusive rights granted by the copyright laws.⁵⁹ Even though this exception creates certain inconsistencies by not applying UCC Article 2B to all information, the drafters sacrificed consistency for the practical concerns over changing the traditional practices in certain industries.⁶⁰

Further, UCC Article 2B applies to software contracts regardless of whether the software is licensed.⁶¹ All software contracts are included in UCC Article 2B because software products have distinct and unique characteristics which are not addressed by the existing bodies of contract law.⁶² For example, UCC Article 2B invalidates all warranties for software where the licensee modifies, adds or deletes the program's code beyond the intended options of the program.⁶³

However, certain software is excluded from UCC Article 2B. The scope of UCC Article 2B expressly excludes embedded computer programs which were not developed specifically for a transaction.⁶⁴ Embedded computer programs are programs which are only one aspect of the sale of a larger product.⁶⁵ For example, computer programs which operate an airplane's navigational system or a car's brake system are not covered separately by UCC Article 2B; instead, the sale of the airplane or car is covered entirely by UCC Article 2.⁶⁶

UCC Article 2B also recognizes that more than one body of contract law can apply to a transaction. Where a contract involves a license for information (a computer program) embedded in a good (a computer disk) and also involves the sale of separate good (computer hardware), both UCC Article 2 and Article 2B can apply.⁶⁷ UCC Article 2B rejects the predominate purpose of the contract test where the entire transaction is regulated by one body of law exclusively.⁶⁸ Instead, UCC

58. NATIONAL CONFERENCE, 1997, *supra* note 2, § 2B-103, Reporter's Note 2. Implied conditions, which are present because of copyright law in any sale of a copyrighted product, are not in themselves adequate to place the transaction within the scope of UCC Article 2B. The key facet of a transaction in software is that the contract imposes express limits on the use of the information. Because the emphasis is on the intangibles, rather than the goods, a license can and often does coexist with a transfer that constitutes a sale of a copy of the licensed subject matter. *Id.*; see *Applied Info. Management, Inc.*, 976 F. Supp. at 149; *DSC Communications*, 976 F. Supp. at 359 (defining the question of scope in such cases as whether the contract expressly limits use of the information or whether it is a software contract).

59. NATIONAL CONFERENCE 1997, *supra* note 2, Reporters Notes to § 2B-103(5).

60. *See id.*

61. *Id.* § 2B-407.

62. *Id.*, Reporters Notes to § 2B-103(3).

63. NATIONAL CONFERENCE 1998, *supra* note 14, § 2B-407.

64. *Id.* § 2B-103(d)(4).

65. NATIONAL CONFERENCE 1997, *supra* note 2, Reporters Notes to § 2B-103(8)(b).

66. NATIONAL CONFERENCE 1998, *supra* note 14.

67. *Id.* § 6.

68. *Id.*

Article 2B applies the “gravaman of the action” test where a particular body of contract law will apply depending on the particular subject matter which is in dispute.⁶⁹ With a contract for the sale of computer hardware and for the license of computer software, UCC Article 2B will apply to the computer software while UCC Article 2 will apply to the sale of the hardware.⁷⁰

However, certain incidental tangible goods are included with UCC Article 2B. Even though the computer disk is a tangible good and is not licensed to the licensee, it will still be covered under UCC Article 2B. Specifically, the scope of UCC Article 2B will cover “the physical medium” containing the information, the packaging, or documentation pertaining to the information, which includes the computer disk as well as any other instructions provided with the information.⁷¹ These incidental items were included under UCC Article 2B to simplify the process and to avoid applying two bodies of contract law for every transaction.⁷²

With the Internet, the same rules are applicable. MUSICO must expressly create a license for UCC Article 2B to apply. If MUSICO does not create a license, then UCC Article 2 will apply to the transaction. However, applying UCC Article 2 to contracts for information over the Internet is inconsistent with the underlying rationale of UCC Article 2B. As was discussed in the prior section, the scope of UCC Article 2 is limited to transactions for goods. MUSICO is not selling a good. The information being transferred only exists as an intangible. This inconsistency is caused by the exception created for certain industries, newspapers and books, where the traditional practice is to sell the information embedded in a tangible good.⁷³ A more consistent approach would be to limit the exception to selling newspapers and books where the information is contained in a tangible good. UCC Article 2B should apply to all contracts over the Internet, where the information is transmitted over the Internet without a tangible good, while UCC Article 2 would still apply to contracts for the sale of goods, where the information is embedded in a tangible good.

2. Advantages and Limitations to UCC Article 2B in Transnational Contracts

a. Advantages to UCC Article 2B

UCC Article 2B will provide MUSICO with certain advantages when entering into international contracts. A license would clearly define the scope for BROWSER’s use of MUSICO’s publication. As will be discussed in the next part

69. *Id.*

70. *Id.*

71. *Id.* § 2B-103(d)(1).

72. *Id.*

73. *See supra* note 58 and accompanying text.

of this Article, the copyright laws of the states will vary from state to state. By using a license, MUSICO can ensure that certain uses of its publications are restricted. Even though certain license provisions may be unnecessary because the copyright laws in BROWSER's state already restrict such action, a uniform licensing agreement would be necessary to cover the differences between the copyright laws in the different states.

Further, the Internet has caused uncertainty in contract formation, because some of the traditional requirements for contract formation cannot be performed over the Internet. UCC Article 2B reconceptualizes the traditional requirements for contract formation to provide legitimacy and uniformity for MUSICO's contracts over the Internet.⁷⁴ Three examples illustrate how UCC Article 2B reconceptualizes the traditional requirements.

First, a writing requirement can be required to provide a sufficient record that a contract exists, or that the parties actually modified a contract.⁷⁵ Under the current UCC definition, a writing includes "printing, typewriting or any other intentional reduction to tangible form."⁷⁶ However, over the Internet, a computer's memory can provide a sufficient record of a contract even though the record is not reduced to a tangible form. In the international community, states are slowly beginning to amend their laws to recognize that the definition of a writing should include more than a record reduced to a tangible form.⁷⁷ For example, within the United Kingdom, a new arbitration law was thought to be "innovative" because the definition of writing was expanded to include "anything recorded by any means" which would include a writing in electronic form.⁷⁸

UCC Article 2B also abandons the idea that a contract must exist in tangible form.⁷⁹ However, instead of changing the definition of a writing, UCC Article 2B replaces the writing requirement with the idea of maintaining a record.⁸⁰ A record can be in a tangible medium, or can be stored in an electronic or other medium as long as it is retrievable in perceivable form.⁸¹

Second, a signature is traditionally required to authenticate that a party adopts a written contract.⁸² Within the international community, states are discussing the need to replace handwritten signatures with an electronic or digital signature which would authenticate that a party agreed to the terms of a contract.⁸³ Within the

74. See generally NATIONAL CONFERENCE 1996, *supra* note 19, Introduction.

75. See e.g., U.C.C. § 2-201; CISG, *supra* note 3, arts. 21, 29.

76. U.C.C. § 1-201.

77. International Chamber of Commerce, *ICC Conferences* (visited Mar. 2, 1998) <http://www.iccwbo.org/conferences/success_story.html> [hereinafter *ICC Conference*].

78. *Id.*

79. NATIONAL CONFERENCE 1998, *supra* note 14, § 2B-113.

80. *Id.* § 2B-102(37).

81. *Id.*

82. See generally ICC Conference, *supra* note 77, at 5.

83. *Id.*

United States, the current UCC defines "signed" to "include any symbol executed or adopted by a party with the present intention to authenticate a writing."⁸⁴ Since the definition of a signature is to authenticate a written document, the implication is that the signature must also exist in tangible form.⁸⁵

Many States have adopted laws which recognize electronic and/or digital signatures; however, no uniform approach has emerged among the States.⁸⁶ Since the uniform approach has not emerged, UCC Article 2B recognizes the legitimacy of the general concept of electronic and digital signatures, but defers to States to pass their own legislation.⁸⁷

Finally, the current UCC does not expressly recognize that a contract can be formed between two computers without any human interaction.⁸⁸ In the international community, the contract laws in Belgian and Burundian would not recognize a contract between two computers without human intervention.⁸⁹ To expressly deal with this issue, UCC Article 2B recognizes that a contract can be concluded with an electronic agent.⁹⁰ An electronic agent is a computer program designed to initiate or respond to electronic messages without review by an individual.⁹¹ With the Internet, a computer can act on behalf of a person for the purposes of concluding a contract and performing under a contract. A human does not need to monitor the computer or its activities.⁹² UCC Article 2B recognizes that a computer acts as an agent for an individual and has the authority to conclude a contract.⁹³ Thus, UCC Article 2B provides many advantages to MUSICO when drafting transnational contracts, because it specifically addresses many of the issues created by the Internet.

b. Limitations to UCC Article 2B

Even though UCC Article 2B will enforce a choice of law clause between MUSICO and BROWSER,⁹⁴ the laws of BROWSER's state can modify the rights and obligations of the parties. For example, if BROWSER was located in the

84. U.C.C. § 1-201.

85. *Id.*

86. See Albert Gidari & John P. Morgan, Survey of State Electronic & Digital Signature Legislative Initiatives, Internet Law & Policy Forum Web Site <<http://www.ilpf.org>> (visited Dec. 19, 1997) (giving Domestic Legislative Initiatives); see also International Chamber of Commerce, GUIDEC: General Usage for International Digitally Ensured Commerce (visited Mar. 2, 1998) <<http://iccwbo.org/guidec2.htm>> (giving international initiatives).

87. See NATIONAL CONFERENCE 1998, *supra* note 14, § 2B-113 and Reporter's Notes.

88. See generally U.C.C.

89. ICC Conference, *supra* note 77, at 9.

90. NATIONAL CONFERENCE 1998, *supra* note 14, § 2B-204 and Reporter's Notes.

91. *Id.*

92. *Id.*

93. *Id.*

94. NATIONAL CONFERENCE 1998, *supra* note 14, § 2B-108.

European Union, certain rights and obligations will apply to the contract regardless of the choice of law. The European Union has enacted a Directive: On the Protection of Consumers in Respect of Distance Contracts (hereinafter Distance Contracts Directive).⁹⁵ Article 12 of the Distance Contracts Directive states:

Binding nature:

(1) The consumer may not waive the rights conferred on him by the transposition of the Directive into national law.

(2) Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States.⁹⁶

MUSICO must comply with the Distance Contracts Directive when contracting with consumers located in the European Union.⁹⁷ Complying with the provisions of the Distance Contracts Directive could impose a burden on MUSICO. Three examples will illustrate the extent of the burden on MUSICO.

First, Article 6 requires that MUSICO provide a right to withdraw from an enforceable contract “without the penalty or without giving any reason.”⁹⁸ The policy justification provided for the right to withdraw is that distance contracts expose consumers to certain risks, because the consumer cannot inspect the goods, services, or information prior to entering into a contract.⁹⁹ A consumer has seven working days to withdraw from the contract.¹⁰⁰ However, if MUSICO fails to comply with Article 5 of the Directive, which is discussed below, then the consumer has three months to withdraw from the contract.¹⁰¹

Article 6 provides certain exceptions to the right to withdraw; however, MUSICO’s publication is not included in any of the exceptions.¹⁰² One exception is “for the supply of audio or video recordings or computer software which are unsealed by the consumer.”¹⁰³ When a consumer unseals or opens the packaging for a computer program, the consumer no longer has the right to withdraw from the contract. The reasoning behind this exception is to prevent consumers from copying

95. Council Directive 97/7/EC, 1997 O.J. (L 144) Protection of Consumers in Respect of Distance Contract [hereinafter Distance Contracts Directive].

96. *Id.* art. 12.

97. *Id.*

98. *Id.* art. 6.

99. Robert Bradgate, *The EU Directive on Distances Sellers*, 4 WEB. J. LEGAL ISSUES, Intro. (visited Dec. 15, 1997) <<http://webjcli.ac.uk/1997/issue4/bradgat4.html>>.

100. Distance Contracts Directive, *supra* note 95, art. 6.

101. *Id.*

102. *Id.*

103. *Id.*

the video recording or computer program and then withdrawing from the contract.¹⁰⁴ In the original draft of this Directive, this exception included any item which can be immediately reproduced or copied by the consumer.¹⁰⁵ While the original draft would have included MUSICO's publication, the exception in the enacted Directive does not apply to MUSICO. Thus, MUSICO must provide European Union consumers with the right to withdraw from contracts.

Second, Article 4 of the Distance Contracts Directive requires MUSICO to provide certain information to BROWSER.¹⁰⁶ This information includes: the identity of the supplier and the supplier's address in the case where payment is required prior to performance; the price of the goods and services including all taxes; the main characteristics of the information being transferred; the consumer's right to withdraw provided under the Distance Contract Directive; and other similar information.¹⁰⁷ Further, the information must be provided in a "clear and comprehensible manner."¹⁰⁸ MUSICO must carefully draft its contracts to be clear and comprehensible for the average consumer whose native language may not be the language of the contract. A contract interpreted by a foreign court, which is filled with legalese, or based on assumed knowledge of consumers within the United States, may not be clear and comprehensible to a consumer in the European Union.

Finally, Article 5 of the Distance Contracts Directive requires that MUSICO provide a written confirmation to a consumer.¹⁰⁹ Even if the information has already been provided by MUSICO, the written confirmation must include MUSICO's business address and information on after sale services and guarantees.¹¹⁰ While providing the information may not be burdensome on MUSICO, the failure to provide the written confirmation will result in a consumer having three months to withdraw from the contract.¹¹¹ Thus, MUSICO should take measures to determine whether a consumer is from the European Union, and thus, entitled to receive a written confirmation.

While UCC Article 2B also contains a right to withdraw from a contract, the Distance Contract Directive is substantially different than UCC Article 2B. UCC Article 2B provides an opportunity to withdraw from a contract and to receive a refund of the purchase price if the consumer does not have the opportunity to review the terms and conditions of the contract which are introduced after

104. Bradgate, *supra* note 99, Withdrawal. The Distance Contract Directive is unclear whether the term "unseal" contemplates and would include the unsealing of an electronic wrapper. *Id.* For example, Preview Software has a TimeLOCK program that allows a person to receive software over the Internet, where the software to be purchased is "wrapped" by TimeLOCK. *See cf.* Preview Software, Products & Solutions 1 (visited Feb. 6, 1998) <http://www.previewsoft.com/product/how.html>.

105. Bradgate, *supra* note 99, Withdrawal.

106. Distance Contracts Directive, *supra* note 95, art. 4.

107. *Id.*

108. *Id.*

109. *Id.* art. 5.

110. *Id.*

111. *Id.*

performance by both parties.¹¹² This section is intended to deal with shrinkwrap licenses. Shrinkwrap licenses have been described as “unsigned license agreements included in the packaging, which state that the user accepts the terms of the license if he/she opens the packaging containing the software, uses the software, or take some other specified action.”¹¹³ Under UCC Article 2B, BROWSER would not have a right to withdraw if BROWSER had an opportunity to review the terms of the license prior to assenting to be bound under the contract. However, assuming BROWSER was a consumer from the European Union, the Distance Contract Directive would allow BROWSER to withdraw from the contract regardless of when the terms of the license were introduced.

The Distance Contract Directive is one example of the difficulties MUSICO could encounter when conducting business over the Internet. If every state decided to enact its own set of rules and regulations which supersede a choice of law clause, then MUSICO would be faced with the difficult task of complying with different states’ rules and regulations every time a contract is concluded over the Internet. To promote international commerce over the Internet, states must be willing to relinquish certain authority over their citizens. States must be willing to defer to an international body of law for the protection of every person using the Internet.

IV. THE EMERGING COPYRIGHT LAWS

This part discusses the emerging legal framework for copyright protection on the Internet. The two overriding issues are how should the existing copyright laws be adapted to apply to the Internet and technology; and what new rights or remedies are needed to provide adequate copyright protection. This part is divided into two sections. Section one introduces the applicable bodies of copyright law in the international community, in the United States and in the European Union. Section two discusses various substantive rights which will be applied to the Internet and technology.

A. *The Applicable Bodies Of Copyright Law*

1. *International Treaties*

This Article focuses on three of the international copyright treaties: the Berne Convention (hereinafter “Berne”);¹¹⁴ the Trade-Related Aspects of International

112. See NATIONAL CONFERENCE 1998, *supra* note 14, §§ 2B-112, 2B-208.

113. Michael D. Scott, *Protecting Software Transactions On-Line: The Use of “Clickwrap” Licenses*, 482 PLI/PAT. 101, 103 (1997).

114. Berne Convention for the Protection of Literary and Artistic Works, Sept. 6, 1886 (revised July 24, 1971, and amended on Sept. 28, 1979) [hereinafter Berne Convention].

Property (hereinafter "TRIPS") Agreement¹¹⁵ under the World Trade Organization;¹¹⁶ and the new WIPO Treaty finalized on December 20, 1996¹¹⁷ (hereinafter referred to collectively as "treaties"). Even though every state has not ratified these three treaties, this Article will take a general approach to the international legal framework.

Each treaty has a distinct role in international copyright protection. Berne is the centerpiece for international copyright protection; both TRIPS and the WIPO Treaty make reference to Berne and adopt, by reference, certain Articles in Berne.¹¹⁸ TRIPS outlines specific remedies for copyright infringement which a state must provide.¹¹⁹ Finally, the WIPO Treaty specifically addresses the Internet and digital technology¹²⁰ and introduces new substantive rights for international copyright protection.¹²¹

The WIPO Treaty is not yet in force and is not binding on any state at present moment.¹²² For the WIPO Treaty to enter into force, thirty states or intragovernmental organizations must ratify the WIPO Treaty (if a state or intragovernmental organization has previously signed the WIPO Treaty), or accede to the WIPO Treaty (if a state or intragovernmental organization has not signed the WIPO Treaty).¹²³ As of January 15, 1998, fifty-one states or intragovernmental organizations have signed the treaty, including the United States and European Communities (Union).¹²⁴ Signing a treaty is an expression of an intent to ratify the treaty.¹²⁵ Since fifty-one states or intragovernmental organizations have signed the treaty, the implication is that these fifty-one states or intragovernmental organizations will ratify the treaty. The WIPO Treaty will enter into force three months after the thirtieth ratification or accession.¹²⁶

This Article will proceed under the assumption that the WIPO Treaty will eventually enter into force. Even if the WIPO Treaty does not enter into force, discussing the WIPO Treaty is still relevant because it shows how any international copyright treaty must balance the different approaches taken by states in applying copyright to technology and the Internet.

115. Agreement on Trade-Related Aspects of Intellectual Property Rights, Jan. 1, 1996, Annex 1C [hereinafter TRIPS]

116. *Id.*

117. WIPO Treaty, *supra* note 9.

118. See Berne Convention, *supra* note 114, art. II; see also WIPO Treaty, *supra* note 9, art. 1.

119. WIPO Treaty, *supra* note 9, § 2.

120. *Agreed Statements Concerning the WIPO Copyright Treaty* (adopted by the Diplomatic Conference on Dec. 20, 1996) [hereinafter *Agreed Statements*].

121. WIPO Treaty, *supra* note 9, arts. 11, 12.

122. Ratification Situation for WIPO Treaty, <http://www.wipo.org/eng/ratific/s-copy.htm>.

123. E-mail from Francis Curry, Acting Legal Counsel, WIPO.

124. See Ratification, *supra* note 122.

125. Curry, *supra* note 123.

126. WIPO Treaty, *supra* note 9, art. 20.

2. United States

The United States is bound by Berne and TRIPS,¹²⁷ and has also signed the WIPO Treaty.¹²⁸ Within the United States, the United States Copyright Act governs copyright protection.¹²⁹ While the United States Copyright Act has not been amended to specifically deal with the Internet, courts in the United States have expanded the scope of the United States Copyright Act to apply to the Internet.¹³⁰ A District Court in the Southern District of New York, in acknowledged dictum, found that a magazine on the Internet is protected by copyright.¹³¹ The court concluded that the compilation of pictures and articles on an Internet site satisfies the definition of a magazine; thus, a magazine on the Internet is also entitled to copyright protection.¹³²

Even though the United States Copyright Act in its present form could be expanded to apply to the Internet, amendments are being discussed which specifically apply the United States Copyright Act to the Internet. President Clinton created the National Information Infrastructure Task Force (hereinafter "NII Task Force") to propose amendments to the United States Copyright Act.¹³³ Based on the task force recommendations, Congress introduced legislation, entitled the National Information Infrastructure Copyright Protection Act of 1995 (hereinafter "NII Act").¹³⁴ The proposed NII Act was intended to (1) amend the current copyright law; (2) clarify copyright law application on the Internet; and (3) create new protection for information on the Internet.¹³⁵

The NII Act was not enacted into law during the 104th Session of Congress. Nevertheless, understanding the NII Task Force recommendations and the proposed NII Act is essential for understanding the United States approach to copyright over the Internet. The NII Task Force recommendations detail how many of the provisions in the current United States Copyright Act will apply to digital technology and the Internet.¹³⁶ The NII Task Force argues that certain substantive rights do not

127. For Berne Members: <http://www.wipo.org/eng/ratific/e-berne.htm>. For WTO Members: <http://www.wto.org/wto/about/organsn6.htm>.

128. See Ratification, *supra* note 122 and accompanying text (discussing the countries who have signed the Treaty).

129. 17 U.S.C.A. § 101.

130. See *Playboy Enter., Inc. v. Chuckleberry Pub., Inc.*, 939 F. Supp. 1032 (S.D.N.Y. 1996), *reh'g denied*, 1996 U.S. Dist. Lexis 8435 (1996).

131. *Id.*

132. *Id.*

133. *Executive Summary and Recommendations from "Intellectual Property and the National Information Infrastructure," The report of the Working Group on Intellectual Property Rights*, Bureau Nat'l Affairs, Inc., Daily Report for Executives, Sept. 6, 1995 [hereinafter *Executive Summary*].

134. See H.R. 2441 and S. 1284, 104th Cong. (1995).

135. *Id.*

136. See generally *Intellectual Property and the National Information Infrastructure*, Working Group on Intellectual Property Rights 79-82 (Sept. 1995) [hereinafter *White Paper*].

need to be amended to apply to digital technology. Understanding the NII Task Force analysis will explain why certain issues are not addressed in future proposed legislation.¹³⁷ Further, the problems with the NII Task Force recommendations and issues left unresolved by NII Task Force will be a basis for understanding any legislation proposed in the future.

Currently, legislation is pending in the 105th Congress entitled WIPO Copyright Treaties Implementation Act (hereinafter "WIPO Implementation Act").¹³⁸ This legislation proposes a new section to the United States Copyright Act which is necessary in order to comply with the WIPO Treaty. However, as will be discussed *infra*, this legislation goes beyond what is required by the WIPO Treaty and creates certain problems which may ultimately prevent it from being enacted into law.

3. European Union

The European Union has developed a unique role in the international community.¹³⁹ The European Union is recognized as an intergovernmental organization;¹⁴⁰ however, the individual members of the European Union are still recognized by the international community as individual states.¹⁴¹ Thus, the European Union can sign a treaty as a collective body while the individual members of the European Union can sign a treaty as independent states.¹⁴²

The European Union is bound by TRIPS¹⁴³ and is in effect bound by Berne.¹⁴⁴ Even though the European Union is not a party to Berne, its members are bound by Berne. Further, the European Union has signed the WIPO Treaty; and all fifteen of the European Union members have signed the WIPO Treaty in their individual capacities.¹⁴⁵

In past directives, the European Union has been active in harmonizing its members' copyright legislation.¹⁴⁶ The European Union harmonized its members' legislation for computer programs and databases, cable and satellite broadcasting, rental rights, and other areas relating to copyright.¹⁴⁷ However, with the Internet, the European Union has not harmonized its members' legislation, because of the significant variation in the extent and scope of copyright protection.¹⁴⁸ Nevertheless, the

137. *Id.*

138. H.R. 2281 and S. 1121, 105th Cong. (1997) [hereinafter WIPO Implementation Act].

139. See WIPO Treaty, *supra* note 9, art. 17.

140. *Id.*

141. *Id.*

142. *Id.*

143. See *supra* note 127 (WTO Contracting Parties).

144. All 15 EU members have signed Berne.

145. See Ratification, *supra* note 122.

146. See *Follow-Up to Green Paper*, *supra* note 8, ch. 1, sec. 2.

147. *Id.*

148. See generally *Follow-Up to Green Paper*, *supra* note 8.

Commission of the European Communities (Union) issued a report entitled: Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society (hereinafter "Green Report").¹⁴⁹ In the Green Report, the Commission makes recommendations on how the European Union should harmonize certain copyright laws to apply to the Internet.¹⁵⁰

B. Substantive Rights

Berne, TRIPS and the WIPO Treaty recognize that a copyright holder has certain exclusive rights in exploiting a work.¹⁵¹ This section is divided into six subsections. Subsection one discusses the right to reproduction. Subsection two discusses the right to distribution. Subsection three discusses the right to communicate to the public. Subsection four discusses protection for technological measures and management system information. Subsection five discusses the remedies available for copyright infringement. Subsection six provides information on recent updates.

1. Right Of Reproduction

a. A Unique Problem With The Internet: Temporary Acts of Reproduction

Copyright protects the expression of an idea but does not protect ideas, procedures, and methods of operation or mathematical concepts.¹⁵² States can grant copyright protection to written or oral expressions of an idea.¹⁵³ The expression of an idea can be fixed in a tangible medium such as a book, or can exist in an intangible medium such as lectures, addresses, sermons and other intangible works.¹⁵⁴

149. *Id.*

150. *Id.*

151. See Berne Convention, *supra* note 114, Preamble; see also U.C.C. art 2., *supra* note 4, Preamble; see also WIPO Copyright Treaty, *supra* note 9, Preamble; see also TRIPS, *supra* note 115, Preamble.

152. WIPO Treaty, *supra* note 9, art. 2.

153. Berne Convention, *supra* note 114, art. 2(1).

The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Id.

154. *Id.*

However, some states require that the expression be fixed in a tangible medium;¹⁵⁵ oral expressions cannot be copyrighted.¹⁵⁶ For example, the United States requires that a copyrighted work be fixed in a tangible medium of expression where it is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for more than a transitory duration.¹⁵⁷ When revising the United States Copyright Act in 1976, the United States adopted a broad definition of fixation to account for future changes in technology.¹⁵⁸ The broad definition of fixation was sufficient to include digital technology, because the zeros and ones in a binary code, when permanently stored in a sequence on a computer disk and perceivable by a person on a computer screen, satisfied the definition of fixation in the United States Copyright Act.¹⁵⁹ Even without a tangible disk, an expression can be fixed within a computer's memory. In one case, a court interpreted the definition of fixation and found that a computer's memory was sufficient fixation.¹⁶⁰ Thus, the fixation requirement in the United States Copyright Act includes a computer program stored on a disk or in the permanent memory of a computer.

However, the Internet creates a new problem by allowing information to be "temporarily stored" or temporarily reproduced in a computer's cache file folder.¹⁶¹ In relation to the Internet, cache has been described as:

An area of computer memory that stores recently used data. Cache makes browsing the Web faster by storing copies of Web pages you have recently viewed. When you want to view a Web page again, the browser retrieves the page from the cache instead of searching for the page on the Web.¹⁶²

155. WIPO Treaty, *supra* note 9, § 102.

156. Berne Convention, *supra* note 114, art. 2(2). "It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form." *Id.*

157. 17 U.S.C.A. § 102(a).

158. White Paper, *supra* note 136, at 26-27. "The form of the fixation and the manner, method or medium used are virtually unlimited. A work may be fixed in "words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia;" may be embodied in a physical object in "written, printed, photographic, sculptural, punched, magnetic, or any other stable form;" and may be capable of perception either "directly or by means of any machine or device 'now known or later developed.'" *Id.*

159. *Id.* at 27. "In digital form, a work is generally recorded (fixed) as a sequence of binary digits (zeros and ones) using media specific encoding. This fits within the House Report's list of permissible manners of fixation. Virtually all works also will be fixed in acceptable material objects—i.e., copies or phonorecords. For instance, floppy disks, compact discs (CDS), CD-ROMs, optical disks, compact discs-interactive (CD-Is), digital tape, and other digital storage devices are all stable forms in which works may be fixed and from which works may be perceived, reproduced or communicated by means of a machine or device." *Id.*

160. *Id.* See, e.g., *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 855 (2d Cir. 1982) (putting work in "memory devices" of a computer "satisf[ies] the statutory requirement of a 'copy' in which the work is 'fixed'").

161. See *MAI Systems Corp v. Peak Computer Inc*, 991 F.2d 511 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994).

162. MARANGRAPHICS, *TEACH YOURSELF THE INTERNET AND THE WORLD WIDE WEB VISUALLY* (IDG Books Worldwide 1997).

The term temporary storage is used to refer to situations where BROWSER's computer stores information in the cache file folder for a limited period of time in connection with the Internet.¹⁶³ Since the cache file folder is allocated only limited memory and is not intended to permanently store information, old cache files are deleted or cleaned up to make room for new information.¹⁶⁴

The question is whether temporary storage of information while connected to the Internet should be considered a copyright infringement. The answer to this question goes beyond simply deciding whether temporary storage falls within the definition of a reproduction, because certain implications arise from extending copyright protection to temporary storage.¹⁶⁵ The nature of the Internet requires that a work be temporarily stored in a computer.¹⁶⁶ Without temporarily storing information in the cache file folder, BROWSER could not effectively or efficiently use the Internet.¹⁶⁷

Since the Internet requires temporary storage of information, extending the copyright laws to cover temporary storage would make every user of the Internet potentially liable for copyright infringement.¹⁶⁸ The question is whether every Internet user should be potentially liable for copyright infringement. This is one of the issues being debated in the international community.¹⁶⁹

b. International Treaties

The right of reproduction is defined, in Article 9 of Berne, as the "exclusive right of authorizing the reproduction of these [copyrighted] works, in any manner or form."¹⁷⁰ While the language of Article 9 is broad enough to cover digital technology,¹⁷¹ Berne does not specifically mention digital technology or the Internet. Since the applicability of copyright to digital technology is uncertain under Berne, an "Agreed Statement Concerning The WIPO Copyright Treaty" (hereinafter "Agreed WIPO Statement") was issued at the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions.¹⁷² Even though the Agreed WIPO

163. See Comments to Joint Hearing on H.R. 2441 and S. 1284, at 57 (prepared statement of Dr. Mihaly Ficsor, Assistant Director General of WIPO) [hereinafter Joint Hearing].

164. Interview with Devon Zane Cox, Founder and President of D Zane Music, Inc. (Oct. 20, 1997).

165. Pamela Samuelson, *Intellectual Property Issues Raised by the National Information Infrastructure*, 454 PLI/PAT 43 (1996).

166. See *supra* note 164 and accompanying text.

167. *Id.*

168. See Joint Hearing, *supra* note 163, at 57.

169. See White Paper, *supra* note 136, at 64-66; see also *Follow-Up to Green Paper*, *supra* note 8, ch. 2, § 1.

170. Berne Convention, *supra* note 114, art. 9.

171. See Joint Hearing, *supra* note 163, at 57 (prepared statement of Dr. Mihaly Ficsor, Assistant Director General of WIPO).

172. *Agreed Statements*, *supra* note 120.

Statement is not binding on any state,¹⁷³ it confirms the view that Article 9 of Berne should “fully apply in the digital environment.”¹⁷⁴

Further, the WIPO Treaty applies the right of reproduction to digital technology,¹⁷⁵ although this was accomplished in an indirect manner. The preamble to the WIPO Treaty expresses the intent to apply the new WIPO Treaty to the new issues raised by technology.¹⁷⁶ Even though the WIPO Treaty does not specifically mention the right of reproduction, it adopts by reference Articles 1-21 of Berne, which includes the right of reproduction in Article 9.¹⁷⁷ By implication, the WIPO Treaty applies the right of reproduction to digital technology.

While the general consensus is that the right of reproduction applies to the Internet,¹⁷⁸ the scope of the right of reproduction is still unclear. The issue of whether temporary acts of reproduction in a computer's cache file folder is a copyright infringement has not been resolved. The WIPO Treaty does not address temporary acts of reproductions.¹⁷⁹ Moreover, the Agreed WIPO Statement leaves the issue unresolved and only states that “[i]t is understood that the *storage* of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention” [emphasis added].¹⁸⁰ The language of this statement is ambiguous because it does not distinguish between temporary and permanent storage. Thus, states could interpret this statement to include temporary reproductions or not to include temporary reproductions.

In deciding whether to apply copyright to temporary acts of reproduction, there are two competing policy considerations. One line of thinking focuses on ensuring that a copyright holder receives adequate protection by extending the right of reproduction to all reproductions. The argument is that when an Internet site is accessed, a reproduction exists in a computer's cache file folder.¹⁸¹ BROWSER can perceive and make use of MUSICO's work. Even if the reproduction is for a temporary period, BROWSER derives benefit from using the work. By not extending the right of reproduction to temporary reproductions, BROWSER could benefit from MUSICO's work without consent or payment.¹⁸² Thus, the right of reproduction should extend to temporary acts of reproduction.

173. E-mail from Dr. Ficsor, Assistant Director General of WIPO (Dec. 2, 1997).

174. *Agreed Statements*, *supra* note 120 (concerning art. 1(4)).

175. WIPO Treaty, *supra* note 9, Preamble.

176. *Id.*

177. *Id.* art. 3.

178. *See Agreed Statements*, *supra* note 120 (concerning art. 1(4)).

179. *See* WIPO Treaty, *supra* note 9 (no discussion of the right of reproduction is included in the WIPO Treaty).

180. *See Agreed Statements*, *supra* note 120 (concerning art. 1(4)).

181. Joint Hearing, *supra* note 163, at 187-88 (prepared statement submitted by Marybeth Peters, Register of Copyrights).

182. *Follow-Up to Green Paper*, *supra* note 8, ch. 1, § 2.

An opposing line of thinking is concerned with the implications of extending copyright protection to temporary acts of reproduction.¹⁸³ The nature of the Internet requires that BROWSER's computer make a temporary reproduction to view information. By extending copyright protection to the Internet, BROWSER could be potentially liable every time BROWSER accesses an Internet site.¹⁸⁴ The Internet would become a sea of liability for copyright infringement, or else the free flow of information would be hindered.¹⁸⁵

Since both arguments have merit, the international community has left states with the discretion to decide the issue for themselves. However, even if the international community extended the right of reproduction to temporary acts of reproduction, the WIPO Treaty, the Berne Convention and TRIPS all provide states with the latitude to create certain limitations or exceptions to the right to reproduction.¹⁸⁶ A state may create limitations or exceptions to the copyright laws provided that they "do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author."¹⁸⁷ Thus, states would still retain the authority to limit copyright protection for temporary acts of reproduction.

c. United States

The NII Task Force argues that the current language of United States Copyright Act would cover all acts of reproduction over the Internet, including temporary storage of information.¹⁸⁸ The current language of the Copyright Act supports this argument. Specifically, when BROWSER views one of MUSICO's publications on the Internet, this action would probably be considered perceiving the binary code in the computer's cache file folder through the use of a machine for a sufficient period of time in order for the work to be perceived.¹⁸⁹ If BROWSER is accessing MUSICO's publication over the Internet for a sufficiently permanent period of time, then the information is fixed in BROWSER's computer.¹⁹⁰ If MUSICO's publication is fixed in BROWSER's computer, then a copy of MUSICO's

183. See Samuelson, *supra* note 165.

184. *Id.*

185. *Id.*

186. See WIPO Treaty, *supra* note 9, art. 10; see also TRIPS, *supra* note 115, art. 13; see also Berne Convention, *supra* note 114, art. 9.

187. *Id.*

188. See White Paper, *supra* note 136, at 64-66. "The question of whether interactive works are fixed (given the user's ability to constantly alter the sequence of the "action" has been resolved by the courts in the context of video games and should not present a new issue in the context of the NII. Such works are generally considered sufficiently fixed to qualify for protection. See, e.g., Atari Games Corp. v. Oman, 888 F.2d 878 (D.C. Cir. 1989). White Paper, *supra* note 136, at 27. The sufficiency of the fixation of works transmitted via the NII, however, where no copy or phonorecord has been made prior to the transmission, may not be so clear." *Id.*

189. White Paper, *supra* note 136.

190. *Id.*

publication is created in BROWSER's computer.¹⁹¹ If a copy is created in BROWSER's computer without authorization, then BROWSER has committed a copyright infringement by simply accessing MUSICO's Internet site.¹⁹²

However, the issue is far from settled in the legal community and in the general public.¹⁹³ In testimony before Congress, members of the NII Task Force argued that the right of reproduction should apply to temporary acts of reproduction, because the issue of temporary storage is more theoretical than reality.¹⁹⁴ Presumably, the members of the NII Task Force do not believe a copyright holder would prosecute another person for simply accessing a work on an Internet site. However, the problem with this argument is that the courts must have a "theoretical" reason not to impose statutory damages if a copyright holder does decide to prosecute for copyright infringement.

Since the proposed NII Task Force does not provide adequate guidance, the courts will be forced to struggle with finding an exception to the right of reproduction. The NII Task Force indicates that the doctrine of fair use should also apply to digital technology.¹⁹⁵ The NII Task Force envisions that courts will engage in a fact-intensive analysis to determine whether a particular use of a work is a copyright infringement or fair use.¹⁹⁶ The NII Task Force admits that no bright line rules are likely to emerge in the area of fair use, including the extent to which temporary reproductions are considered fair use.¹⁹⁷ This "wait and see" approach is problematic because it creates uncertainty for everyone using the Internet. While courts will hopefully not hold the average citizen liable for simply using the Internet, unnecessary litigation will be required in order to establish certain basic rules. Litigation could take years to establish a simple rule that the technology

191. See White Paper, *supra* note 136, at 64-66.

192. *Id.*

193. See generally Digital Era Copyright Enhancement Act, H.R. 3048, 105th Cong. (1997); see also Samuelson, *supra* note 165.

194. Joint Hearing, *supra* note 163, at 105 (prepared statement of Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks).

195. *Id.* "It is reasonable to expect that courts would approach claims of fair use in the context of the NII just as they do in 'traditional' environments. Commercial uses that involve no "transformation" by users and harm actual or potential markets will likely always be infringing, while nonprofit educational transformative uses will likely often be fair. Between these extremes, courts will have to engage in the same type of fact-intensive analysis that typifies fair use litigation and frustrates those who seek "bright lines" clearly separating the lawful from the unlawful." *Id.*

196. 17 U.S.C.A. § 107. Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section [sic], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *Id.*

197. See White Paper, *supra* note 136, at 73-84.

inherent in using the Internet is not itself a copyright infringement. Moreover, the growth of the Internet could be hindered while courts are creating fair use exceptions. A better approach would be to amend the United States Copyright Act to establish guidelines for fair use over the Internet and to provide basic examples for actions which would not be a copyright infringement.

d. European Union

The European Union will harmonize its members' legislation to cover the permanent storage of information on the Internet.¹⁹⁸ However, disagreement has arisen between the European Union members over whether temporary reproductions on the Internet should be copyright infringement.¹⁹⁹ In prior directives, the European Union has already taken a stance on the issue of temporary acts of reproduction. Specifically, in the European Union Computer Programs Directive, reproduction is defined as "all 'permanent or temporary reproduction . . . by any means and in any form.'"²⁰⁰ The Computer Programs Directive indicates that the European Union has made the policy choice to extend copyright protection to temporary acts of reproduction.²⁰¹

Based on the prior directives by the European Union, the Green Report indicates that the European Union will apply the right of reproduction to all permanent and temporary acts of reproduction.²⁰² The Green Report argues that "such an approach should be taken where certain acts of reproduction would risk unreasonably prejudicing the right holder's legitimate interests or which would conflict with normal exploitation of his intellectual property."²⁰³

However, the proposed harmonization does suggest that certain exceptions and limitations should apply when the exclusive right to temporary reproductions is not enforceable "for whatever reason."²⁰⁴ The Green Report envisions that a state may grant a legal license, combined with the right of remuneration, if the right of repro-

198. *Follow-Up to Green Paper*, *supra* note 8, ch. 2, § 1.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Follow-Up to Green Paper*, *supra* note 8, ch. 2, § 1.

Any initiative will define the exact scope of the acts protected by the reproduction right with respect to all its beneficiaries—authors and related rightholders. This should be done along the lines of the *acquis communautaire*. Such an approach could clarify that the digitization of works and other protected matter, as well as other acts such as scanning, or uploading and downloading of digitized material are, in principle, covered by the reproduction right. It would also cover, for the same reasons, transient or other ephemeral acts of reproduction. Unless, as a starting point and without prejudice to explicit limitations or exceptions, such a wide coverage is provided for at EU level, consistent protection across Member States would remain ephemeral.

Id.

203. *Id.*

204. *Id.*

duction is not enforceable.²⁰⁵ Further, the Green Report envisions that certain limitations will apply to temporary acts of reproduction, citing to fair use as an example.²⁰⁶ Even though the Green Report does suggest certain limitations and exceptions that could apply to temporary reproductions, the European Union will likely leave the discretion to its individual members to implement any specific provisions.

2. Right Of Distribution

a. International Treaties

Berne recognizes the right of distribution in the limited area of cinematographic works.²⁰⁷ However, the general right of distribution is a new right granted in the WIPO Treaty and is defined as:

Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.²⁰⁸

The definition of the right to distribution is dependent on a violation of the right of reproduction, because the definition of the right to distribution requires that a copy be transferred. Since a copy is required, the right of reproduction must be violated for the right to distribution to be violated.²⁰⁹ In light of this dependency, some states include the right of distribution within the right of reproduction and argue that the Berne Convention already includes the right to distribution through the right of reproduction in Article 9.²¹⁰

Notwithstanding this argument, some states have argued that the right of distribution should not apply to the Internet.²¹¹ The Agreed WIPO Statement limits the scope of the right to distribution to "fixed copies that can be put into circulation as tangible objects."²¹² This statement reflects the view of certain states that transmitting information over the Internet is a service and not a good. For example, the European Union rules concerning the free movement of goods and services treat

205. *Id.*

206. *Id.*

207. Berne Convention, *supra* note 114, art. 14.

208. WIPO Treaty, *supra* note 9, art. 6.

209. Michael W. Walter, *Copyrights and Related Rights in a Network Environment—The Integration of Digital Diffusion in Existing Legal Systems*, SOFTIC Symposium 1995; *Problems of Intellectual Property Rights in the Context of the Information Networks*, Tokyo, Japan 325, 333 (1995).

210. *Id.*

211. See *Follow-Up to Green Paper*, *supra* note 8, ch. 2, § 4.

212. *Agreed Statements*, *supra* note 120 (concerning arts. 6 and 7).

on-line transactions as services.²¹³ The European Union's reasoning relates to the exhaustion principle.²¹⁴ The exhaustion principle is the same basic concept as the first sale doctrine in the United States.²¹⁵

Exhaustion is a limitation of the right of distribution.²¹⁶ The right of distribution is exhausted once an authorized copy (good) has been brought into circulation by or with the consent of the right holder.²¹⁷ Once a copy is sold or put into circulation by the rightholder, the particular copy can be further distributed without authorization from the rightholder.²¹⁸ With tangible copies, the impact of the exhaustion principle is limited, because BROWSER no longer possesses a copy of the information after transferring it to a third party.

If exhaustion was applied to the Internet, then it could have a devastating impact on copyright protection.²¹⁹ Once a copyright holder has distributed an authorized copy, the copy could be transmitted an unlimited amount of times.²²⁰ This would create a conflict between the right of distribution and the right of reproduction, because each distribution would create a new copy of the work while the original copy is still retained by the sender.²²¹ If distribution applied to the Internet, a copyright holder could be required to allow additional reproductions to be distributed since the rights in the original work were already exhausted. To avoid this result, some states treat transmissions of information over the Internet as a service.²²²

The WIPO Treaty provides another means for a state to avoid the implications of the exhaustion principle. A state has the option not to apply the exhaustion principle to the right of distribution.²²³ Specifically, the WIPO Treaty states:

Nothing in this Treaty [WIPO Treaty] shall affect the freedom of Contracting Parties to determine the conditions, if any, under which exhaustion . . . applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.²²⁴

Thus, states have two different means to prevent exhaustion from applying to the Internet. First, a state can treat on-line transactions as services; and therefore, the

213. Dr. Jens Gaster, *Copyright and Related Rights in the Information Society*, SOFTIC Symposium 1995; *Problems of Intellectual Property Rights in the Context of the Information Networks*, Tokyo, Japan 225, 235 (1995).

214. *Follow-Up to Green Paper*, *supra* note 8, ch. 2, § 4.

215. 17 U.S.C.A. § 109 (1997).

216. Gaster, *supra* note 213.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. See White Paper, *supra* note 136, at 110-17.

222. *Follow-Up to the Green Paper*, *supra* note 8, ch 2, § 4.

223. WIPO Treaty, *supra* note 9, art. 6.

224. *Id.*

right of distribution does not apply to the Internet. Second, a state can expressly limit the application of the exhaustion principle over the Internet.

b. United States

The United States Copyright Act recognizes the right to distribution and also recognizes the first sale doctrine.²²⁵ In order to clarify that the right to distribution applies to the Internet, the NII Task Force proposed to amend the definition of “distribution” in Section 106(3) to read:

“to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership by rental, lease, or lending, *or by transmission*” (emphasis added).²²⁶

The phrase “by transmission” is the only addition to the definition of distribution. The proposed NII Task Force recommended amending the definition of transmit under Section 101 to read:

“To ‘transmit’ a reproduction is to distribute it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent.”²²⁷

The word transmission was added to the right of distribution in order to clarify that the right of distribution would apply to the Internet.²²⁸ This proposed amendment would clarify that transmitting a work to the public over the Internet is a distribution, which requires the right holder’s authorization.²²⁹ When MUSICO transmits a work to BROWSER, MUSICO distributes the work.

This raises the issue of whether the United States will apply the first sale doctrine to the Internet. As discussed in the prior subsection, the first sale doctrine would severely undermine copyright protection if applied to the Internet. With this in mind, the NII Task Force recommends that the first sale doctrine should not apply to the Internet.²³⁰ The NII Task Force’s reasoning is based on the fact that the sender of the information still retains a copy of the information.²³¹ By allowing the sender to retain a copy, the underlying assumption of the first sale doctrine is violated; the person sending the work still retains a copy of the work. Thus, the NII

225. NATIONAL CONFERENCE 1997, *supra* note 2, §§ 106(3) and 111.

226. *Executive Summary*, *supra* note 133, Appendices 1.

227. *Id.*

228. *Id.* at 9-11.

229. *Id.*

230. White Paper, *supra* note 136, at 110-17.

231. *Id.*

Task Force recommends that the first sale doctrine should not apply to the Internet.²³²

Since the argument has been made that the right of distribution is implicit in the right of reproduction,²³³ there is a question as to why the United States is applying right of distribution to the Internet. Two answers are provided by the NII Task Force.²³⁴ First, the United States Copyright Act requires that a work must change hands in order to be published.²³⁵ If viewing information over the Internet is not a distribution, the information does not change hands; thus, it is not published. By applying the right of distribution to the Internet, it makes it clear that the information is changing hands, allowing information to be published over the Internet.²³⁶ Second, the right of distribution applies in situations where the right of reproduction does not apply.²³⁷ A person may have authorization to reproduce a work, such as a printer having the right to make copies of a book; however, the printer does not have authorization to distribute copies of the book. Thus, since the right of distribution could be violated without violating the right of reproduction, the right of distribution will be an important substantive right on the Internet.²³⁸

c. European Union

The proposed harmonization does not apply to the right of distribution to the Internet, because the European Union considers works exploited with the Internet as services and not as goods.²³⁹ With databases, the European Union has already established that a good is not exchanged in an on-line transaction.²⁴⁰ Since the definition of the right to distribution requires that a tangible object be produced, the European Union can avoid the right of distribution by treating on-line contracts as services contracts.²⁴¹

The reason the European Union treats transactions over the Internet as a service is to avoid conflict with the exhaustion principle.²⁴² The European Union has the

232. *Id.*

233. *Executive Summary*, *supra* note 133, at 9-11.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Follow-Up to Green Paper*, *supra* note 8, ch. 2, § 4. "Furthermore, harmonized legislation should affirm that the principle of exhaustion applies to the distribution of goods only and not to the right applicable to the provision of services, notably not of on-line services." *Id.* "Such a measure, which would reflect the existing case law of the Court of Justice on the non-applicability of exhaustion to the provision of services, would enhance legal certainty across Member States." *Id.*

240. *Id.*

241. *Id.*

242. *Id.* "As regards exceptions, a large consensus exists that no exhaustion of rights occurs in respect of works and other subject matter exploited on-line, as this qualifies as a service." *Id.* "Parties confirmed that given that services can in principle be repeated an unlimited number of times, the exhaustion rule cannot apply." *Id.* "A

principle of Community Exhaustion which allows the free dissemination of goods after they are placed into circulation in the European Union by the copyright holder.²⁴³ Once a good has been distributed within the European Union, the good can be freely distributed throughout the European Union.²⁴⁴ A person could potentially distribute the information to anywhere in the European Union without violating the right to distribution. Thus, to avoid conflict with community exhaustion the European Union will not apply the right of distribution to transactions over the Internet. However, without applying the right of distribution to the Internet, the European Union must rely on another substantive right to prevent an individual from circulating unauthorized copies of a work.

3. Right To Communicate To The Public

a. International Treaties

The general term "right to communicate to the public" is broad and encompasses a variety of different concepts. The WIPO Glossary defines communication to the public as:

Making a work, performance, phonogram, or broadcast perceptible in any appropriate manner to persons in general, that is, not restricted to specific individuals belonging to a private group. This notion is broader than publication and also covers, among others, forms of use such as public performance, broadcasting communication to the public by wire, or direct communication to the public of the reception of a broadcast.²⁴⁵

Berne provides a general right to communicate to the public for certain means of communication including: cinematographic works, performances of musical and dramatic works, the broadcasting of literary works and public recitation of literary works.²⁴⁶ However, Berne does not extend to protect all literary works transmitted over the Internet since computer programs, graphic works, photographic works and sheet music can not be either broadcast or recited to the public.²⁴⁷

The WIPO Treaty provides a right to communicate to the public which extends protection to all copyright works.²⁴⁸ The right to communicate to the public is defined as:

large number of interested parties took the view that any legislative initiative should spell out explicitly that the right applicable to the provision of on-line services may not be subject to exhaustion." *Id.*

243. Gaster, *supra* note 213, at 235.

244. *Id.*

245. Gaster, *supra* note 213, at 238.

246. Berne Convention, *supra* note 114, art. 8.

247. *Id.*

248. WIPO Treaty, *supra* note 9, art. 8.

authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.²⁴⁹

The right to communicate to the public is essential for states which will not apply the right of distribution to the Internet. Both the right of distribution and the right to communicate to the public subject a different person to liability than the right to reproduction. The right of reproduction holds the receiver of an unauthorized work liable for infringement. However, the right to distribution and the right to communication to the public holds the sender of the information liable for infringement. Thus, states which do not apply the right of distribution to the Internet must rely on right to communicate to the public.

Further, the right to communicate to the public in the WIPO Treaty is narrower than the general definition in the WIPO Glossary. The language "in such a way that members of the public may access these works from a place and at a time individually chosen by them"²⁵⁰ has two effects. First, broadcasting is excluded from this definition by using the requirement of individual choice.²⁵¹ The right to communicate to the public will apply in situations where the information is available to the public at a time chosen by the individual.²⁵² In contrast, broadcasting rights apply to pre-defined programming schedules where an individual is presented the information at a specified time.²⁵³

Second, the definition of communicate to the public in the WIPO Treaty excludes private communications. However, the WIPO Treaty does not define public.²⁵⁴ There are two possible definitions of the term public. One line of thinking is that the right to communicate to the public should be based on providing accessibility to the public at large.²⁵⁵ Presumably, with the Internet, accessibility could include sending information via e-mail.²⁵⁶ Accessibility could also include four or five individuals using the same access code to information when only one individual is authorized to access the information.²⁵⁷ In these situations, the right to communicate to the public would be violated, because the individual with authorization is allowing the work to be accessible (communicated) to the public.

249. *Id.*

250. *Follow-Up to Green Paper*, *supra* note 8, ch. 2, § 2

251. *Id.*

252. *Id.*

253. *Id.*

254. *See* WIPO Treaty, *supra* note 9.

255. *Follow-Up to Green Paper*, *supra* note 8, ch. 2, § 2.

256. Gaster, *supra* note 213, at 238.

257. *Id.*

An opposing line of thinking would maintain the traditional public versus private distinction.²⁵⁸ The private use exception could apply to sending information via e-mail. Further, the private use exception could allow four or five people, such as family members, to share access to information on the Internet.²⁵⁹ The issue would turn on how the term public is defined. Since the WIPO Treaty does not clearly define the term public, states will have discretion in defining the term public.

b. United States

The United States Copyright Act does not recognize the right to communicate to the public. Further, since the NII Task Force issued its report prior to the completion of the WIPO Treaty, the NII Task Force does not address the right to communicate to the public.²⁶⁰ However, the United States Copyright Act does recognize the right to display a work to the public.²⁶¹ To display a work is to show a copy of a work, either directly or by means of film, slide, television image, or any other device or process.²⁶² To display a work to the public means:

- (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.²⁶³

The right to display to the public and the right to communicate to the public are similar concepts.²⁶⁴ The reason that the right to communicate to the public was used in the WIPO Treaty is that Berne already recognizes the right to communicate to the public and that most states recognize the right to communicate to the public and not the right to display.²⁶⁵ However, since the concepts are so similar, the United States could conclude that the United States Copyright Act does not need to be amended to comply with the WIPO Treaty.

258. *Id.*

259. *Id.*

260. See generally White Paper, *supra* note 136.

261. 17 U.S.C.A. § 106(5).

262. 17 U.S.C.A. § 101.

263. *Id.*

264. See Joint Hearing, *supra* note 163, at 61 (Dr. Ficsor's written statement).

265. *Id.*

The right to display to the public also has exceptions similar to the right to communicate to the public. The United States Copyright Act creates an exception for the normal circle of a family and its social acquaintances.²⁶⁶ This exception may allow family members and other acquaintances to form an on-line group where the members of the group share access to information. Family members and acquaintances could share a work without violating the right to display to the public. Moreover, if the right of reproduction is not applied to temporary acts of reproduction, then families and acquaintances could potentially share a work over the Internet from different parts of the United States provided that the work is not downloaded. Since the proposed NII Act does not address any of these issues, the courts will be forced to address them.

c. *European Union*

The proposed harmonization will apply the right to communicate to the public to the Internet.²⁶⁷ As with the WIPO Treaty, the European Union will distinguish between the right to communicate to the public and broadcasting.²⁶⁸ Further, since the European Union will not apply the right of distribution to the Internet, the right to communicate to the public will provide additional protection for right holders on the Internet.²⁶⁹ A right holder will be able to hold a person liable for making available unauthorized copies of a work over the Internet.²⁷⁰ BROWSER would not be held directly liable for violating the right of reproduction, because BROWSER did not make an unauthorized copy. However, BROWSER would be liable for providing another individual with access to MUSICO's publication under the right to communicate to the public.

Further, the right to communicate to the public will provide protection for a right holder in the network environment.²⁷¹ The European Union is contemplating a broad definition for the right to communicate to the public, because there is

266. 17 U.S.C.A. §101.

267. *Follow-Up to the Green Paper*, *supra* note 8, ch. 2, § 2. "In view of the outcome of the consultation procedure, it is proposed to protect digital "on-demand" transmissions on the basis of a further harmonized right of "communication to the public." *Id.* "These harmonized rules would be linked as closely as possible to the traditional concept of communication to the public." *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* "Interested parties confirm that as far as the transmission of a protected work or related subject matter over the net involves reproductions, the reproduction right should ensure adequate protection. Both Member States and interested parties are, however, agreed that such protection would not be sufficient as the transmission of a work in a network environment "on-demand" will not necessarily imply acts of reproduction. In order to allow for interactive transborder services to be provided throughout the Single Market, it is considered necessary that rightholders should have available to them an additional right which enables them to adequately control "on-demand" transmissions of their works or other subject matter." *Id.*

concern over situations where the right of reproduction may not be violated.²⁷² Presumably, the European Union is contemplating two possible situations. First, a group of people can share access to a work when only one person is authorized to access the work. Second, the European Union could be contemplating intranet servers, or "thin networks."²⁷³ A work can be placed on a server where local terminals have access to work.²⁷⁴ A local terminal can contain only 8 megabytes of memory and does not need memory for disk storage because the computer programs and other information are maintained on the main server.²⁷⁵ Even though a complete copy of the information will not exist in the local terminal, the person using the local terminal will be able to use the information on the main server.²⁷⁶ The right to communicate to the public would hold an individual liable for making a work available to others without authorization.²⁷⁷

4. *Technological Measures And Management System Information*

a. *International Treaties*

The WIPO Treaty introduces protection for technological measures.²⁷⁸ Article 11 of the WIPO Treaty states:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.²⁷⁹

Technological measures are computer programs which regulate access to works over the Internet. Technological measures apply in two different situations. First, technological measures are programs that protect information from unwanted visitors to an Internet site.²⁸⁰ For example, Firewalls prohibit BROWSER from

272. *Id.*

273. Conversations with Darrell Zane Cox, Enterprise Planner and Architect, Southern California Information Systems; Boeing-North American Inc. (Oct. 17, 1997).

274. Background Information on IBM's New Desktop Networking Computer, <<http://www.Internet.ibm.com/computers/networkstation/whitepaper.html>> (visited Dec. 21, 1997).

275. *Id.*

276. *Id.* See Darrell Cox, *supra* note 273.

277. *Follow-Up to Green Paper*, *supra* note 8, at 219-39.

278. WIPO Treaty, *supra* note 9, art. 11.

279. *Id.*

280. Conversation with Devon Zane Cox, founder of D Zane Music, Inc., consultant to Scores International, Inc. (Oct. 19, 1997). See White Paper, *supra* note 136, at 219-39.

gaining access to MUSICO'S Internet site without prior authorization.²⁸¹ Second, technological measures can also be encryption technology which restrict access to individual works once BROWSER has access to the Internet site.²⁸² An encryption code limits BROWSER's ability to access the information, to download the information, or to print individual files without authorization.²⁸³

Further, the WIPO treaty also introduces protection for Management System Information.²⁸⁴ Management System Information is defined as:

information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.²⁸⁵

Management System Information consists of the copyright holder's name, the terms of use (a license), and other similar information.²⁸⁶ Management system information is distinguishable from a formal notice requirement, because management system information is not required in order to receive copyright protection; Article 5(2) of the Berne Convention prohibits requiring formal notice requirements for copyright protection.²⁸⁷ Thus, the WIPO Treaty will only apply if a copyright holder chooses to supply this information.

b. United States

The WIPO Implementation Act introduces, both management system information and technological measures.²⁸⁸ Section 1201 states in its relevant parts:

(1) No person shall circumvent a technological protection measure that effectively controls access to a work protected under this title.

(3) As used in this subsection—

(A) to circumvent a technological protection means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid,

281. White Paper, *supra* note 136, at 219-39.

282. *Id.*

283. *Id.*

284. WIPO Treaty, *supra* note 9, art. 12.

285. *Id.*

286. *Id.* art. 5.

287. Berne Convention, *supra* note 114, art. 5(2).

288. WIPO Implementation Act, *supra* note 138.

bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological protection measure effectively controls access to a work of the measure, in the ordinary course of its process or treatment, with the authority of the copyright owner, to gain access to the work.²⁸⁹

The WIPO Implementation Act extends protection for technological measures beyond the scope of the WIPO Treaty. The WIPO Treaty allows technological measures to be circumvented if authorized or permitted by law.²⁹⁰ However, the WIPO Implementation Act does not provide for any exceptions for technological measures. Thus, the fair use doctrine could be circumvented by simply placing technological protection on a work, preventing an individual from reverse engineering a computer program, or copying uncopyrightable material.²⁹¹

Further, the WIPO Implementation Act also prohibits the alteration of Management System Information.²⁹² The definition of Management System Information includes the title of the work, the name of the author, the name of the copyright holder, terms and conditions of use, identifying numbers or symbols referring to such information, and other information relating to the Registration of the work.²⁹³

Although formalities cannot be required to receive copyright protection under Berne, the combination of management system information and technological measures could be the only means to assert protection for information over the Internet. In order to establish terms and seek compensation for use of its publication, MUSICO must restrict access through technological measures until BROWSER agrees to certain contractual terms and conditions and pays MUSICO compensation. Further, management system information may be necessary to claim copyright protection against third parties for publications already licensed to BROWSER. With the amount of information on the Internet where copyright holders do not assert copyright protection, management system information may be required to have a valid claim of copyright protection. Without warning a person that copyright protection will be sought, a court may not be inclined to hold a person liable for copyright infringement.

289. *Id.*

290. WIPO Treaty, *supra* note 9, art. 11.

291. *See generally* Digital Era Copyright Enhancement Act, *supra* note 193, § 2(b)(2), § 8.

292. WIPO Implementation Act, *supra* note 138.

293. *Id.*

c. *European Union*

The proposed harmonization in the Green Report states that it will protect technological measures and Management System Information.²⁹⁴ However, the proposed harmonization does not specify the scope and extent of protection. Since the European Union has signed the WIPO Treaty, the European Union will probably have similar provisions.

5. *Remedies*

a. *International Treaties*

Without a remedy, copyright protection is ineffective. Prior to the TRIPS and the WIPO Treaty, international treaties gave little attention to specifying the particular legal remedies available for copyright infringement.²⁹⁵ Under the TRIPS Agreement, Member States are required to provide specific monetary and non-monetary remedies.²⁹⁶ The TRIPS Agreement requires: (1) damages,²⁹⁷ (2) destruction of unauthorized works and materials with the predominant purpose to aid in reproducing unauthorized works,²⁹⁸ (3) provisional measures for prompt and effective protection,²⁹⁹ (4) criminal procedures for willful copyright piracy on a commercial scale,³⁰⁰ and (5) other related remedies.³⁰¹

The WIPO Treaty also requires a state to provide remedies for copyright infringement.³⁰² However, the WIPO Treaty does not specify any remedies which must be implemented into a state's domestic laws; instead, the WIPO Treaty only requires a state to provide enforcement procedures "to permit effective action against any act of infringement of rights covered by this Treaty."³⁰³ Further, the WIPO Treaty requires states to provide "civil remedies" against individuals that remove or alter management system information without authority.³⁰⁴

294. *Follow-Up to Green Paper*, *supra* note 8, ch. 2, § 3 - ch. 3, § 3.

295. *See generally* Berne Convention, *supra* note 114, art. 16 (giving the only remedy).

296. TRIPS, *supra* note 115, art. 41.

297. *Id.* art. 45.

298. *Id.* art. 46.

299. *Id.* art. 50.

300. *Id.* art. 60.

301. *Id.* arts. 41-62.

302. WIPO Treaty, *supra* note 9, art. 14.

303. *Id.*

304. *Id.*

b. United States

Under the United States Copyright Act, monetary and non-monetary remedies are also available.³⁰⁵ The monetary damages include: actual damages or statutory damages; disgorging of profits from copyright infringing;³⁰⁶ triple damages for repeat violators;³⁰⁷ and costs and attorney's fees for the prevailing party.³⁰⁸ The non-monetary protection includes temporary and permanent injunctions to prevent further infringement,³⁰⁹ and forfeiture of any device or product used with the intent to commit a copyright violation.³¹⁰ A person can also be held criminally liable for committing a copyright infringement "willfully and for purposes of commercial advantage or private financial gain."³¹¹ Finally, the WIPO Copyright Treaty Implementation Act introduces further civil and criminal penalties for violating the protection for technological measures and management system information.³¹²

c. European Union

The European Union has proposed to clarify the existing remedies in member states instead of harmonizing the remedies.³¹³ Since the European Union members are bound by TRIPS, the remedies discussed above should be provided in the European Union.

6. Recent Updates

a. United States

i. Enacted Amendment

On December 16, 1997, the No Electronic Theft Act (hereinafter "NET Act") was signed by President Clinton.³¹⁴ The NET Act lessens the threshold for criminal copyright infringement by removing the requirement that a person be motivated by a desire for financial profit; instead, the NET Act would impose criminal liability

305. 17 U.S.C.A. §§ 501-511 (West 1995).

306. *Id.* § 504.

307. *Id.*

308. *Id.* § 505.

309. *Id.* § 502.

310. *Id.* § 509.

311. *Id.* § 506(a).

312. WIPO Implementation Act, *supra* note 138, §§ 1203 and 1284.

313. *Follow-Up to Green Paper*, *supra* note 8, ch. 3, § 2.

314. No Electronic Theft Act, H.R. 2265, 105th Cong. (1997) [hereinafter NET Act].

for simply receiving a copyrighted work with a value over US\$5,000.³¹⁵ Specifically, Section 506(a) of the Copyright Act was amended to read in its relevant parts:

(a) CRIMINAL INFRINGEMENT - Any person who infringes a copyright willfully either—

- (1) for purposes of commercial financial gain, or
- (2) by reproduction or distribution, including electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than US\$1,000, shall be punished as provided under section 2319 of title 18, United States Code.³¹⁶

The United States Copyright Act now expressly creates criminal liability for reproductions and distributions by electronic means.³¹⁷ Assuming the phrase “electronic means” includes the Internet, the new amendment appears to make certain assumptions which are reflected in the NII Task Force recommendations. Specifically, as discussed above, the NII Task Force argued that the right of reproduction in the United States Copyright Act already covers temporary and permanent storage of information in a computer. Further, the NII Task Force argues that the right of distribution already applies to the Internet, even though the NII Task Force recommended adding the phrase “to transmit” to the definition of the right of distribution to clarify this point. By introducing the NET Act before specifically addressing the NII Task Force recommendations, Congress and the President may be indicating that the right of reproduction and the right of distribution will not receive any further amendments or clarifications to apply to the Internet.

ii. *Proposed Amendment: Digital Era Copyright Enhancement Act*

On November 13, 1997, new amendments were proposed to the United States Copyright Act entitled the Digital Era Copyright Enhancement Act (hereinafter “Digital Era Act”).³¹⁸ The Digital Era Act introduces proposals which are in conflict with the NII Task Force recommendations and the WIPO Implementation Act and also addresses many of the issues left unresolved by the NII Task Force. Some of the proposed amendments introduced by the Digital Era Act include the following:

315. *Legislation: Proposed Law Imposing Criminal Penalties for Copyright Infringement Passed in House*, COMPUTER LAW., Dec. 1997, at 34, 35.

316. NET Act, *supra* note 314.

317. *Id.*

318. Digital Era Copyright Enhancement Act, *supra* note 193.

1) Section 2 amends the language of the fair use exception. Section 2 applies fair use to the Internet by stating that no independent weight should be given to the means by which a work is performed, displayed or distributed. The NII Task Force assumed that fair use would apply to the Internet. The Digital Era Act clarifies this point.

Further, Section 2 adds a provision which applies the fair use exemption to digital technology notwithstanding the protection provided to technological measures.³¹⁹ As discussed in subsection four of this Article, the WIPO Implementation Act does not allow for the circumvention of technological protection. Section 2 would allow a person to circumvent technological measures if the action was protected by the fair use exception.

2) Section 4 amends the first sale doctrine to limit its application in a digital format. The first sale doctrine applies to a digital format only if the transferor “erases or destroys his or her copy or phonorecord at substantially the same time.”³²⁰ A copy of one of MUSICO’s publications could not be sent to a third party by BROWSER unless the original copy possessed by BROWSER was erased or destroyed.

3) Section 6 addresses digital copies and temporary reproductions.³²¹ Even though Section 6 of the Digital Era Act proposes to amend Section 117 of the United States Copyright Act, which applies to computer programs,³²² the language of Section 6 indicates that it will apply to all works in a digital format.³²³ Section 6 states:

Notwithstanding the provision of section 106, it is not an infringement to make a copy of a work in a digital format if such copying (1) is incidental to the operation of a device in the course of the use of a work otherwise lawful under this title; and (2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.³²⁴

This language would probably protect the general public from copyright infringement for simply using the Internet, since copies made in a computer’s cache file folder could be considered incidental to the operation of a device.³²⁵ Further, subsection (2) borrows language from international treaties which serves as an overriding limitation to any exception or limitation to copyright protection.³²⁶ If the

319. *Id.* § 2.

320. *Id.* § 4.

321. *Id.* § 6.

322. *Id.*; see 17 U.S.C.A. § 117.

323. Digital Era Copyright Enhancement Act, *supra* note 193, § 6.

324. *Id.*

325. *Id.*

326. *Id.* § 6(2).

Digital Era Act is enacted into law, the courts will be provided with a basic statutory rule for deciding issues surrounding temporary acts of reproduction.

4) Section 7 addresses issues concerning the crossover between licenses and copyright protection.³²⁷ Section 7 makes clear that any non-negotiable license terms under state common law or statutes are not enforceable to the extent that the license limits use of material which is not copyrightable.³²⁸ Further, non-negotiable license terms are unenforceable if they “abrogate or restrict the limitations on exclusive rights specified in sections 107 through 114 and sections 117 through 118 of this title.”³²⁹ Section 7 shows the growing concern surrounding UCC Article 2B and shrinkwrap licenses. Shrinkwrap licenses are problematic because the terms of the license are assented to by opening the packaging of the product after the customer has already paid for the software or other information.³³⁰

MUSICO can avoid the problems associated with shrinkwrap licenses by requiring BROWSER to accept the terms of the license before payment or transmission of MUSICO’s publication.³³¹ Over the Internet, these types of contracts have been referred to as a “clickwrap” licenses,³³² because BROWSER simply “clicks” a button on BROWSER’s computer to accept the terms of a contract.³³³ A clickwrap license is different than a shrinkwrap license because a clickwrap license does not impose restrictions on BROWSER after formation and performance of the contract.³³⁴

However, the term “non-negotiable license” in the Digital Era Act raises some concern, because other contracts could be deemed non-negotiable. If MUSICO uses an electronic agent to conclude a contract and perform under the contract, BROWSER may not have an opportunity to negotiate terms of the contract. MUSICO is offering its contract terms on a “take it or leave it” basis, because the computer agent may not be programmed to negotiate terms of a contract. Section 7 could be interpreted to include licenses on a “take or leave it” basis, even if the terms must be accepted prior to payment and performance under the contract.

5) Section 8 introduces protection for technological measures and management system information. The language of Section 8 is different from the language in the WIPO Implementation Act.³³⁵ Section 8 allows for circumvention of technological measures when a person does not have the purpose of “facilitating or engaging in an act of infringement.”³³⁶ The language of Section 8 works in

327. *Id.* § 7.

328. *Id.*

329. *Id.*

330. Scott, *supra* note 113, at 103-08.

331. *Id.*

332. *Id.* at 109.

333. *Id.*

334. *Id.*

335. See generally WIPO Implementation Act, *supra* note 138.

336. Digital Era Copyright Enhancement Act, *supra* note 193, § 8.

conjunction with the amendments proposed in Section 2 of the Digital Era Act. A person is permitted to bypass technological measures when the person's actions would be permitted under the fair use exception. If BROWSER could establish that the purpose of circumventing MUSICO's technological measures was for educational purposes or was consistent with the fair use doctrine, then BROWSER could circumvent MUSICO's technological measures without violating Section 8. In addition, BROWSER could circumvent technological measures on a computer program to reverse engineer the program, or could circumvent technological measures to access information, which is not copyrightable.

Further, Section 8 allows for the manufacturing, importing, or distributing of devices or computer programs which are intended to circumvent technological measures.³³⁷ This provision of Section 8 is also in conflict with the WIPO Implementation Act.³³⁸ However, since Section 8 allows for the circumvention of technological measures when the circumvention is consistent with the fair use exception,³³⁹ Section 8 must also allow for manufacturing, importing, or distributing of devices designed to circumvent technological measures.³⁴⁰ Finally, Section 8 introduces protection for management system information which is substantially similar to the WIPO Implementation Act.³⁴¹

b. European Union

The European Union has recently circulated a "Draft for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society" (hereinafter "Draft Directive").³⁴² The Draft Directive proposes 14 different articles for harmonization of the legislation for European Union members. The proposed harmonizations are consistent with the proposals in the Green Report.³⁴³ Seven of these articles are discussed below.

1) Article 2 harmonizes the right of reproduction in the European Union. Article 2 states in its relevant parts:

Member States shall provide the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and

337. *Id.*

338. See WIPO Implementation Act, *supra* note 138, § 8.

339. See *id.*, §§ 2 and 8.

340. Digital Era Copyright Enhancement Act, *supra* note 193, § 8.

341. WIPO Implementation Act, *supra* note 138, § 8. Compare § 8, with WIPO Treaty, *supra* note 9, art. 12.

342. Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society (Draft, Fall 1997) [hereinafter Draft Directive].

343. *Id.*

in any form, in whole or in part: for authors, of the original and copies of their work. . . .³⁴⁴

UCC Article 2 extends copyright protection to all reproductions of a work, including temporary copies produced in a computer's cache file folder.³⁴⁵ The comments to UCC Article 2 argue that all temporary reproductions should be protected because there would be serious economic prejudice to the right holder if temporary reproductions were not covered.³⁴⁶ However, as discussed below, certain limitations and exceptions will apply to the right of reproduction.

2) Article 3 harmonizes the right to communicate to the public in the European Union. The language of Article 3 is similar to the language in the WIPO Treaty discussed in subsection 3 above. The scope of right to communicate to the public is intended to extend to any act of displaying a work other than distributing physical copies. The comments to Article 3 state that "[i]f, at any point of a transmission or at the end of a transmission the work is communicated to the public, including through display on screen, each such communication to the public requires authorization of the author."³⁴⁷

Further, exhaustion will not apply to the right to communicate to the public; thus, a right holder will not lose (exhaust) copyright by communicating a copy of a work to the public. Finally, the definition of the term "public" is left to the individual members of the European Union. However, the comments to Article 3 make clear that use of the term public would not cover "mere private communications."³⁴⁸ As with the WIPO Treaty, the public is those individuals whom have access to a work at a time and place of their choosing.

3) Article 4 harmonizes the distribution right and declares that "[m]ember States shall provide authors, in respect of their works or copies thereof, with the exclusive right to any form of distribution to the public by sale or otherwise."³⁴⁹ The right of distribution will apply "exclusively to fixed copies that can be put into circulation as tangible objects."³⁵⁰ Thus, the right of distribution will not apply to the Internet.³⁵¹

4) Article 5 harmonizes the exceptions and limitations to the exclusive rights granted to a rightholder. The European Union uses the general guidelines in international treaties as the overriding three step test for establishing the validity of any exception or limitation to copyright protection. Specifically, any exception or

344. *Id.*

345. *Id.*; see *Background on Copyright and Related Rights in the Information Society- Proposal for Directive*, 2 (Dec. 10, 1997) (visited Feb. 5, 1998) <<http://europa.eu.int/comm/dg15/en/imtprop/1100.htm>>.

346. Draft Directive, *supra* note 342, pt. Two; Comments to the Articles, art. 2.

347. *Id.* pt. Two; Comments to the Articles, art. 3.

348. *Id.*

349. *Id.* pt. Two; Comments to the Articles, art. 4.

350. *Id.*

351. *Id.*

limitation should only apply (1) in certain special cases, which (2) do no conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the author.³⁵² Article 5 expressly addresses the issue of temporary acts of reproduction. Temporary acts of reproduction shall be exempt from UCC Article 2 if it is “integral to a technological process made for the sole purpose of enabling a use of a work or other subject matter that is authorized or otherwise permitted by law and have no separate economic significance.”³⁵³ Presumably, the basic function of temporary storage of a work in a computer’s cache file folder would be exempt because this temporary storage is integral to using the Internet, is made for the sole purpose of enabling BROWSER to view a work and has no separate economic significance. However, UCC Article 2 does not address the issue of innocent infringement where BROWSER is unknowingly viewing an unauthorized copy of a work.

Further, Article 5 proposes to allow a member of the European Union to provide for limitations to Articles 2 and 3 under certain circumstances (*viz.*, for teaching and scientific research, for visually handicapped or hearing-impaired persons, for short excerpts for the purposes of reporting current events, for quotations for the purposes of criticism or review, and for public security).³⁵⁴

5) Article 6 proposes to harmonize obligations concerning technological measures. Article 6 is similar to the provisions in the WIPO Treaty; however, Article 6 extends coverage to “any activity, including preparatory activities such as the manufacture and distribution, as well as services, that facilitate or enable the circumvention of these devices.”³⁵⁵ The expansion of protection of technological measures is intended to target commercial companies that produce, sell, rent or advertise circumventing devices.³⁵⁶

6) Article 7 proposes harmonization for obligations concerning rights management information. Article 7 is substantially similar to Article 12 in the WIPO Treaty.³⁵⁷

7) Finally, Article 8 proposes to harmonize the remedies available for copyright infringement. Although Article 8 provides only a general remedial framework, it still requires that members provide appropriate sanctions and remedies which are “effective, proportionate, and dissuasive,” and take all necessary measures to effect remedial measures, including injunctions and seizure of infringing material. The comments to Article 8 cite to the WIPO Treaty and TRIPS for the relevant remedies and sanctions which must be provided to a rightholder.³⁵⁸

352. *Id.* pt. Two: Comments to the Articles, art. 5.

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.* pt. Two: Comments to the Articles, art. 7; see WIPO Treaty, *supra* note 9, art. 12.

358. Draft Directive, *supra* note 342, pt. Two: Comments to the Articles, art. 8.

V. PROBLEMS WITH ENFORCING CONTRACT OR COPYRIGHT CLAIMS AGAINST A
PERSON IN ANOTHER STATE

Once a copyright infringement has occurred, a right holder must determine whether enforcement is feasible. This section will discuss (1) the problems with bringing a cause of action in BROWSER's state, (2) the problems with bringing a cause of action in the United States, (3) two alternatives in international arbitration, and (4) problems with enforcement of a foreign judgment or arbitral awards.

A. *Bringing an Action in Browser's State*

Depending on the circumstances, MUSICO can proceed under a contract or copyright claim. If MUSICO does not have a direct contractual relationship with BROWSER, then MUSICO must proceed under a copyright infringement claim. However, if MUSICO has a direct contractual relationship with BROWSER, then MUSICO can proceed against BROWSER with either a copyright infringement claim, or a breach of contract claim.

With a copyright claim, MUSICO will not have to address the issue of subject matter jurisdiction, because a court in BROWSER's state will likely apply its own copyright laws. As a general rule, the laws in a jurisdiction where protection is sought govern copyright protection.³⁵⁹ However, MUSICO must consider the scope of the copyright laws in BROWSER's state. Primarily, MUSICO must consider whether and to what extent BROWSER's state has copyright laws. Further, assuming BROWSER's state has signed Berne, MUSICO must consider whether BROWSER's state applies copyright protection to the Internet.

Even if BROWSER's state has signed Berne and TRIPS, there is no guarantee that BROWSER's state would interpret Berne to apply to the Internet. The WIPO Treaty is the only treaty which specifically applies to the Internet. However, the WIPO Treaty is not currently in force. Without Berne or TRIPS clearly stating that they apply to the Internet, a state could decline to extend copyright protection to the Internet. Moreover, even if BROWSER's state applies its laws to the Internet, certain actions may not be a copyright infringement.

359. Draft Directive, *supra* note 342, at 7-8; see *Follow-Up to Green Paper*, *supra* note 8, ch. 3, § 2. Due to the territorial nature of intellectual property protection and on the basis of the principle of national treatment, rightholders usually enjoy a bundle of national intellectual property rights. The law applicable to acts of exploitation is the law of the place of exploitation and/or infringement. The law of the country in which protection is claimed governs the object of protection, the eligibility for protection, first ownership, transfer of rights, scope of protection (limitations and exceptions), the term of protection, etc. That country's legal rules also apply as regards the law of contracts, enforcement and jurisdiction.

Id.

Since there is no general right of distribution or right to communicate to the public in Berne,³⁶⁰ the copyright laws in BROWSER's state could allow BROWSER to provide access to MUSICO's publication without committing a copyright infringement. If BROWSER's state does not extend copyright protection to temporary acts of reproduction, then BROWSER could allow access to MUSICO's works without an infringement. Thus, depending on the copyright laws in BROWSER's state, MUSICO may not be able to proceed with a copyright claim against BROWSER.

To avoid concern over the scope of copyright protection, MUSICO could license use of the information. To ensure that a license is valid, MUSICO could use a choice of law clause, which applies UCC Article 2B to the license.³⁶¹ However, BROWSER could argue the choice of law should be invalidated. There is legal authority in the international community to invalidate a choice of law provision³⁶² if the specific laws chosen are contrary to the fundamental policy in BROWSER's state, and if BROWSER's state has a materially greater interest than MUSICO'S state in determination of the particular issue.³⁶³ BROWSER could argue that any contract which attempts to limit the rights granted by the copyright laws in BROWSER's state should be invalidated. Further, if BROWSER's state provides a fair use exception, BROWSER could argue that any terms of a license which limit BROWSER's ability to use the work for fair use purposes should be invalidated as contrary to the policies of BROWSER's state.

Finally, assuming MUSICO had a valid copyright or contract claim in BROWSER's state, MUSICO may find that traveling to BROWSER's state to bring a cause of action is not feasible. MUSICO must consider the cost of obtaining a lawyer in a foreign state and of bringing a claim. MUSICO may not have the financial means to pursue a claim against BROWSER. However, MUSICO cannot allow the unauthorized work to remain on the Internet, because millions of people will have access to MUSICO's publication without authorization. Thus, MUSICO must look for another alternative to suing in BROWSER's states.

B. Bringing an Action in the United States

1. Choice Of Forum

When entering into a contract with MUSICO, BROWSER could have agreed to a choice of forum clause where the courts in the United States would have exclusive jurisdiction. The United States Supreme Court has held choice of forum

360. Berne Convention, *supra* note 114, Part IV.B(2)(a).

361. National Conference 1997, *supra* note 2, § 2B-106.

362. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 (1969).

363. *Id.*

clauses valid so long as enforcement does not unreasonably disadvantage a party.³⁶⁴ UCC Article 2B adopts the rule established by the Supreme Court.³⁶⁵

Two potential problems could occur with choice of forum clauses. First, the court could find the choice of forum is unreasonable. BROWSER could be located thousands of miles away from the United States. If BROWSER is an individual or a small business, BROWSER may be unreasonably disadvantaged by defending a claim in the United States.

Second, a choice of forum clause is useless if BROWSER chooses not to defend the claim. If BROWSER has no assets or business relations in the United States, then BROWSER may not travel to the United States to defend a suit by MUSICO. Even though MUSICO could obtain a default judgment, MUSICO is still faced with the prospect of enforcing the judgment in BROWSER's state, requiring MUSICO to bring an enforcement action in BROWSER's state.

2. *Subject Matter Jurisdiction*

With a copyright claim, a court in the United States must decide the proper legislative jurisdiction to prescribe. As a general rule, the legislative jurisdiction of a state is based on the principal of territoriality, where the infringement or other harm must occur within a particular state for its laws to apply.³⁶⁶ If MUSICO is suing in a court in the United States, then MUSICO should argue that the United States Copyright Act should apply, because any cause of action based on the copyright laws of another jurisdiction may be dismissed based on forum non conveniens.³⁶⁷ In order to determine legislative jurisdiction under the United States Copyright Act, MUSICO has two alternatives for pleading the appropriate legislative jurisdiction.

First, MUSICO could argue that the act of infringement occurred within the United States. MUSICO would have to argue that BROWSER was violating the right of distribution to the public by distributing copies of MUSICO's publication in the United States, or violating the right to display to the public by providing members of the public access to MUSICO's publication. Further, MUSICO could argue that BROWSER is violating Section 602 of the United States Copyright Act by importing copies of its publications into the United States without MUSICO's authorization.³⁶⁸ If BROWSER places one of MUSICO's publications on its Internet site, then by implication every person in the United States connected to the Internet

364. *Bremen v. Zapata*, 407 U.S. 1, 10 (1972).

365. National Conference 1997, *supra* note 2, § 2B-107.

366. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 812-22 (1993) (Scalia, J., dissenting).

367. Paul Edward Geller, *Litigating Cross-Boarder Infringement in International Intellectual Property: Some Practice Tips and Caveats*, NEW MATTER, FALL/WINTER 1997, at 6.

368. 17 U.S.C.A. § 602. The NII Task Force recommended adding the phrase "to transmit" to § 602 in order to clarify that transmitting unauthorized works into the United States via the Internet would violate § 602. See *Executive Summary*, *supra* note 133, at 12.

will have access to the infringing publication. Thus, MUSICO probably has a strong argument that the United States Copyright Act should apply to all acts of copyright infringement, which enter into the United States.

However, with legislative jurisdiction based on territoriality, MUSICO may not be satisfied with the scope of the remedy. A court in the United States may only be willing to craft a remedy for infringements within the United States. In a trademark case, one court in the United States limited the scope of the injunction to preventing access to an Internet site in the United States without addressing the issue of copyright infringement in any other state.³⁶⁹ Thus, if a court bases legislative jurisdiction solely on territoriality, then the court may not be inclined to issue an injunction, which would regulate activity outside of the United States. MUSICO would only have a partial remedy against BROWSER.

Second, MUSICO could argue that the United States' Copyright Act should be applied extraterritorially. With the United States Copyright Act, the territoriality principle as been followed as an "undisputed axiom."³⁷⁰ However, within the anti-trust context, the United States Supreme Court has been willing to apply the United States laws extraterritorially. Specifically, the United States Supreme Court developed the "effects doctrine" to apply the United States' anti-trust laws to foreign companies whose anti-competitive activities have a substantial effect within the United States.³⁷¹ MUSICO could argue that the nature of the Internet requires that a court in the United States apply the United States Copyright Act to activities that have an effect in the United States. Once BROWSER distributes hundreds of unauthorized copies over the Internet, the inevitable result will be these infringing copies and other infringing copies will eventually enter the United States or have a substantial effect on the rights of a person located in the United States. Thus, any infringing copy over the Internet should be under the jurisdiction of the United States Copyright Act.

However, MUSICO must consider problems with enforcement of a judgment against a person located in another state. If BROWSER is not located in the United States, then a court in the United States may not have the ability to enforce a remedy against BROWSER. MUSICO may have to enforce the judgment in BROWSER's state. Enforcement of a foreign judgment will be discussed below.

369. See Geller, *supra* note 367, at 5 (citing *Playboy Enter., Inc. v. Chuckleberry Pub., Inc.*, 687 F.2d 563 (2d Cir. 1982)).

370. Marc E. Mayer, *Localizing Global Copyright Infringement: Do International Internet Sound Recording Infringements Implicate U.S. Copyright Law?*, NEW MATTER, Fall/Winter 1997, at 21 (citing *Subafilms, Ltd. v. MGM-Pathe Comm. Co.*, 24 F.3d 1088 (9th Cir. 1994); *Itsi T.V. Prod., Inc. v. Cal. Auth. of Racing Fairs*, 785 F. Supp. 854, 863 (E.D. Cal. 1992)).

371. *Id.*

3. Personal Jurisdiction

MUSICO must also establish that the court has jurisdiction over BROWSER. Since this article assumes that a court would not have general jurisdiction over BROWSER, a non-resident, the court must determine whether it has specific jurisdiction.³⁷² In order to find specific jurisdiction under the United States Constitution (hereinafter "Constitution"), a court must find that a defendant has enough minimum contacts with the forum that the exercise of jurisdiction "does not offend traditional notions of fair play and substantial justice."³⁷³ Minimum contacts require that the defendant commit some action by which the defendant purposefully avails himself of the privilege of conducting activities in the forum state; thus, evoking the benefits and protections of its laws.³⁷⁴

Courts in the United States are addressing the issue of personal jurisdiction over the Internet.³⁷⁵ Courts recognize, because of the transitory nature of the Internet, that due process requirements for personal jurisdiction should be relaxed.³⁷⁶ Within the United States, courts have been willing to exercise jurisdiction over defendants based on their interstate business conduct through the Internet.³⁷⁷ A court in Minnesota found jurisdiction over a Nevada corporation which specialized in sports gambling.³⁷⁸ The court found that, *inter alia*, the defendant's intent to solicit business in Minnesota and actual solicitation of business in Minnesota was sufficient to establish jurisdiction.³⁷⁹

However, courts have declined to exercise jurisdiction over an individual for simply maintaining an Internet site which can be accessed within the court's jurisdiction. One court dismissed a trademark claim for lack of personal jurisdiction where the defendant did not actively solicit business in the forum State.³⁸⁰ Even though an alleged trademark violation was accessible in the forum State through the Internet, the court found that "creating a site, like placing a product in the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state."³⁸¹

With regards to obtaining jurisdiction over foreigners, the courts have been hesitant to find jurisdiction. A court in New Jersey found that it had no jurisdiction

372. See Neil A. Smith, *No Jurisdiction From Internet Web Page Bearing Infringing Service Mark*, NEWS MATTER, Volume 22, Number 3, 42 (discussing the distinction between general and specific jurisdiction of a court and discussing the test for specific jurisdiction over a non-resident defendant).

373. *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

374. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

375. Kenneth J. Nunnenkamp, *Other Internet Activities Create Personal Jurisdiction*, FED. DISCOVERY NEWS (Jan. 1997).

376. *Id.* (citing *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996)).

377. See *Humphrey v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (1997).

378. *Id.*

379. *Id.*

380. *Bensusan Restaurants Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996).

381. *Id.*

over a defendant in Italy.³⁸² The dispute involved an incident that occurred at a hotel in Italy. The court rejected plaintiff's argument that since the defendant provided photographs, telephone numbers and other information over the Internet which was accessible in New Jersey, the court in New Jersey should have personal jurisdiction. The court found that advertising on the Internet would not confer jurisdiction over the defendant.³⁸³

Further, a court in New York expressed concerns about courts regulating the Internet; and thus, the court refused to prohibit any violations outside of the United States.³⁸⁴ The court commented that "Tattilo [defendant] cannot be prohibited from operating its Internet site merely because the site is accessible from within one country in which the product is banned. To hold otherwise 'would be tantamount to a declaration that this Court, and every other court throughout the world, may assert jurisdiction over all information providers on the global World Wide Web.'"³⁸⁵

In deciding this issue, courts will have to determine the extent to which the Constitution will allow the courts to exercise jurisdiction over foreigners. If BROWSER is soliciting business in the United States and is actually selling MUSICO's publication in the United States, then MUSICO could obtain jurisdiction. However, if BROWSER is simply placing an infringing publication on the Internet without any economic benefit, the case law is unclear whether a United States court would have jurisdiction. In deciding this issue, a court must struggle with extending the jurisdiction of the United States courts to all acts of copyright infringement on the Internet.

C. An International Solution: Arbitration

Arbitration is a procedure in which the dispute is submitted to one or several arbitrators who make a decision binding on the parties to the dispute.³⁸⁶ The section will discuss two forums for arbitration: (1) The WIPO Arbitration and Mediation Center, and (2) On-line Arbitration.

1. The WIPO Arbitration And Mediation Center

The WIPO Arbitration and Mediation Center was established to deal specifically with intellectual property issues. For simplicity purposes, this section will focus on the WIPO Arbitration Rules and will highlight different benefits for MUSICO.

382. *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D. N.J. 1997).

383. *Id.*

384. *Playboy Enter., Inc. v. Chuckleberry Pub., Inc.*, 687 F.2d 563 (2d Cir. 1982).

385. *Id.*

386. WIPO Arbitration and Mediation Center, WIPO Arbitration Rules (effective Oct. 1, 1994).

Article 46 of the WIPO Treaty establishes provisional measures, including injunctions. An injunction is a valuable remedy for MUSICO. If BROWSER is an individual, then monetary remedies may not be adequate to protect MUSICO. Further, the immediate termination of an infringement is essential to preventing further dissemination of the unauthorized work. Once an unauthorized work has been disseminated over the Internet, MUSICO may have a difficult time locating infringing copies and removing them from the Internet.

Article 63 of the WIPO Treaty specifies the time periods in which the dispute must be heard and in which the final award should be made. The dispute must be heard and declared closed nine months after the Statement of Defense or after the establishment of the tribunal, whichever is later.³⁸⁷ The final award must be delivered within three months of the closing of the dispute. While a year is a long time for MUSICO to wait, the burden of waiting a year will be lessened by provisional orders granted under Article 46.

Article 69 of the WIPO Treaty specifies the cost of arbitration. The minimum fee for a dispute is US\$2,000 for the Registration Fee and an Administration Fee; however, the fees are subject to adjustment if the remedy sought is an injunction.³⁸⁸

Finally, Articles 71 and 72 of the WIPO Treaty provide the arbitrators with latitude in apportioning the costs of arbitration or the other parties legal fees, unless there is an agreement between the parties to the contrary.

While the WIPO Arbitration and Mediation Center is available, MUSICO may be faced with numerous license or copyright violations. BROWSER may not be the only person violating MUSICO's license or copyright. MUSICO may desire a more cost efficient and expedient solution.

2. On-line Arbitration

In the future, On-line arbitration may be the best solution for MUSICO because it is tailored to deal with individual acts of copyright infringement. On-line arbitration can significantly reduce the costs of arbitration, and can expedite the process.³⁸⁹ Two different projects have been initiated for on-line dispute resolution.

First, the WIPO Arbitration and Mediation Center is beginning an on-line dispute resolution service for domain names starting in the first quarter of 1998.³⁹⁰ However, the WIPO Arbitration and Mediation Center envisions that it will be available for other types of commercial disputes by mid-1998.³⁹¹ The advantages

387. *Id.*

388. *Id.*

389. E. Casey Lide, *ADR and Cyberspace: Role of ADR in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, 218-22 (1996); see *On-Line Dispute Resolution Procedures for Domain Names and Other Intellectual Property Disputes*, WIPO Arbitration and Mediation Center, January 1998 (visited February 4, 1998) <<http://www.wipo.org/eng/arbit/online.htm>> [hereinafter WIPO On-Line Dispute].

390. WIPO On-Line Dispute, *supra* note 389.

391. *Id.*

of this project are: (1) all the paperwork, except for original documentation will be filed on-line; (2) all proceedings can be conducted using electronic chat over the Internet; (3) independent panelists will be selected to hear the dispute; and (4) WIPO is creating specific rules and procedures for arbitration and mediation over the Internet.³⁹²

Second, the Virtual Magistrate Project is designed to hear copyright disputes for on-line service providers.³⁹³ Even though the current project focuses on resolving disputes involving service providers, the concept could be expanded to include all copyright disputes or contract disputes related to information. Virtual Magistrates are available on-line to hear disputes, and the complaint, answer, hearing and final judgment are all conducted on the Internet. The dispute will be resolved within 72 hours.³⁹⁴

On-line Alternative Dispute Resolution (ADR) is likely to emerge as the preferred method of dispute resolution because of its advantages. For MUSICO, On-line ADR would offer an expedient resolution to individual acts of copyright infringement, or contract breach. Further, On-line ADR could be an effective deterrent to copyright infringement.³⁹⁵ A Virtual Magistrate could hear the dispute and issue a decision within a couple of days.³⁹⁶

D. Enforcement of Foreign Judgments or Arbitral Awards

Any court judgment or arbitral award will be subject to review in BROWSER'S state, if BROWSER decides to challenge the judgment or award.³⁹⁷ A concern for MUSICO is that a reviewing court will have ample mandatory and discretionary grounds to refuse to recognize a foreign judgment or arbitral award.³⁹⁸ The mandatory grounds for nonrecognition include (1) the proceeding lacked due process, or (2) the court lacked personal jurisdiction.³⁹⁹ The discretionary grounds for nonrecognition include: (1) lack of subject matter jurisdiction; (2) insufficient notice to the defendant; and (3) the cause of action was contrary to public policy.⁴⁰⁰ Finally, enforcement may be easier if the arbitration system was internationally recognized.

Even if a court in the United States found personal jurisdiction to hear the case, MUSICO would be forced to relitigate the same jurisdictional issue in a court in

392. *Id.*

393. Lide, *supra* note 389, at 218-22.

394. *Id.*

395. *Id.*

396. *Id.*

397. Ronald Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Aspects*, 67 NOTRE DAME L. REV. 253, 270 (1991).

398. *See id.* at 280 (discussing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 (1986)).

399. *Id.* at 266-67.

400. *Id.*

BROWSER's state. Further, a court could refuse to recognize a judgment for lack of subject matter jurisdiction. If a court in the United States or an arbitrator applied the United States Copyright Act to an act of infringement which occurred in BROWSER's state, then a court could decline to enforce the judgment. Thus, a foreign judgment or an arbitral award, without an effective enforcement mechanism, may not be an adequate remedy for MUSICO.

VI. CONCLUSION

MUSICO faces a difficult challenge in protecting its publications on the Internet. The Internet is an international means of communication which defies the jurisdictional borders of the individual states. However, the states are still actively crafting their own laws for the Internet, regardless of whether the laws are burdensome to businesses or inconsistent with laws in other states. Instead of developing inconsistent rules for the Internet, the states should look to the international community to adopt a basic framework which states can implement into their domestic legislation.

With copyright law, the WIPO Treaty is a significant step to bringing a uniform framework to the international community. Even though the substantive rights can vary in their implementation, these rights cover the same basic actions. For example, the United States can rely on the right of distribution and the right to display to the public while the European Union can rely on the right to communicate to the public.

Even though the WIPO Treaty advances international copyright protection, certain issues still need to be resolved to maintain a uniform approach on the Internet. For example, a conflict exists between protection for technological measures and fair use. MUSICO has an interest in preventing BROWSER from circumventing the technological measures on its Internet site. However, BROWSER has the right to circumvent the technological measures for certain legitimate purposes and can continually attempt to circumvent MUSICO's technological measures without copyright infringement. The problem is that MUSICO will have a difficult time distinguishing between legitimate purposes and purposes which would be a copyright infringement. In the future, the international community should address this issue and other issues which remain unresolved on the Internet.

With contract law, the Distance Contracts Directive in the European Union shows the problem with relying on states to protect its citizens. If every state enacted its own requirements for contracts with its citizen, then MUSICO would face a difficult challenge and may be forced to restrict business to the states where MUSICO is familiar with the laws of the state. Since protecting individuals from fraud and other such issues over the Internet is a problem faced by every state, international rules for the protection of individuals using the Internet should be dealt with on an international level.

Further, any contract law should determine the nature of the item being transmitted over the Internet. To avoid confusion, states need to decide whether MUSICO's publication is a good, a service, or information. In addition, any contract law should recognize the distinction between licensing or selling. An international body of contract law similar to the CISG could be adopted to bring a uniform approach to contracts over the Internet. However, a controversial issue in the international community will probably be the interplay of copyright and contract law. While UCC Article 2B is a sound approach to the licensing of information, states could raise objections to the circumvention of their exceptions to copyright protection through the use of a license. A workable body of international contract law which addresses technology and the Internet is probably years away from being feasible.

Finally, with regard to enforcement measures, the international community must develop a system to resolve contract and copyright disputes. The system must be simple, quick, inexpensive and enforceable in any state. A system will be more feasible once the international community develops a uniform approach to copyright and contract law, because arbitrators then will not need to know the laws of every state. Currently, an arbitrator can not simply specialize in hearing cases from one state, because the contract law from one state could apply through a choice of law clause while the copyright law of the other state could apply through jurisdictional restraints on copyright enforcement. Thus, international arbitration also requires uniform copyright and contract laws.

Until all of these issues are resolved, MUSICO must assume a substantial amount of risk when conducting business on the Internet. MUSICO should develop strong technological measures which will allow MUSICO to control access to and use of its publications. Contract and copyright protection will be secondary for MUSICO since it will not have the time or the resources to pursue every breach of contract or copyright infringement. As for laws similar to the Distance Contracts Directive, MUSICO may consider developing ways to determine the state of origin of BROWSER. If MUSICO is unfamiliar with the contract laws or copyright protection in BROWSER's state, MUSICO may decide not to conduct business with BROWSER. Instead, MUSICO may target only certain states for business where MUSICO understands and can comply with the laws. Ultimately, MUSICO must assess the risks created by the Internet and decide to what extent it is willing to pursue the new opportunities for international commerce created by the Internet.

